Supreme Court, U.S.
FILED
JUN 4 - 2010
OFFICE OF THE CLERK

No. 09-976

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC. (f/k/a Philip Morris, Inc.),
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *BOSE* AND ITS PROGENY 2

II. REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS OVERSTEPPED ITS JURISDICTIONAL BOUNDS 7

III. REVIEW IS WARRANTED BECAUSE THE INJUNCTIONS ARE INCONSISTENT WITH FED. R. CIV. P. 65(d) AND THIS COURT'S PRECEDENT 10

CONCLUSION 12

APPENDIX A: Oral Argument Transcript (Oct. 14, 2008) 1a

APPENDIX B: Brief for Defendants-Appellants (May 19, 2008) 61a

APPENDIX C: Petition for Rehearing of Philip Morris USA Inc. (July 31, 2009) 119a

TABLE OF AUTHORITIES

Page(s)

CASES

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 6

Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921) 9

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 1, 2, 5, 6

Boyle v. United States, 129 S. Ct. 2237 (2009) 7

Byrum v. Landreth, 566 F.3d 442 (5th Cir. 2009) 2

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 8

Davric Me. Corp. v. Rancourt, 216 F.3d 143 (1st Cir. 2000) 6

E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 6

FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985) 4

Horne v. Flores, 129 S. Ct. 2579 (2009) 9

Illinois v. Krull, 480 U.S. 340 (1987) 10

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 9

McComb v. Jacksonville Paper Co.,
336 U.S. 187 (1949) 11

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 5

Newman-Green, Inc. v. Alfonzo-Larrain,
490 U.S. 826 (1989) 11

Peel v. Attorney Registration & Disciplinary Comm'n,
496 U.S. 91 (1990) 5

Russello v. United States,
464 U.S. 16 (1983) 8

Samantar v. Yousuf,
No. 08-1555 (June 1, 2010) 8

Schmidt v. Lessard,
414 U.S. 473 (1974) 11

United States v. Schooner Peggy,
5 U.S. (1 Cranch) 103 (1801) 9

STATUTES

18 U.S.C. § 1961(1) 11

18 U.S.C. § 1961(4) 7

18 U.S.C. § 1964(a) 8

RULES

Fed. R. Civ. P. 65(d) 1, 10, 11

REPLY BRIEF FOR PETITIONER

The sole basis for jurisdiction in this case required the government to establish (i) a statutory "enterprise" (ii) that is likely to violate RICO in the future. The government did neither, but a single judge nonetheless adopted the government-drafted findings and issued obey-the-law injunctions that defy Fed. R. Civ. P. 65(d). The D.C. Circuit, in turn, refused to perform the independent review that *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), requires. For good measure, the D.C. Circuit also declined even to address the recent enactment of comprehensive federal tobacco legislation that destroys any basis for jurisdiction. Not surprisingly, very little about this can be squared with the relevant statutes, this Court's cases, or the law of other circuits.

The government's arguments against review are factually baseless and legally wrong. Thus, its claim that defendants challenged no fact-finding is false; defendants attacked the key findings that underlay the judgment, including specific intent, the likelihood of future violations, and the "fraud" regarding "light" cigarettes, environmental tobacco smoke ("ETS"), and addiction. And the D.C. Circuit addressed those challenges—but refused to apply *Bose*.

Similarly, appellate courts may not ignore intervening Acts of Congress that deprive them of jurisdiction by punting a correct resolution of the case to later proceedings under Rule 60(b); nor may they ignore the text of RICO merely because other circuits have. Finally, an appellate court may not uphold open-ended injunctions by incorporating 4,000-plus

"fact-findings"—a ground expressly precluded by Rule 65(d).

Conceived as a political prop for a State of the Union address, this litigation transparently was designed to restrict defendants' protected speech, yet culminated in deeply flawed government-drafted rulings that received no meaningful appellate review. The blizzard of paper filed by respondents cannot paper over those facts.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *BOSE* AND ITS PROGENY.

The D.C. Circuit's application of the "highly deferential" clearly erroneous standard of review squarely conflicts with *Bose*—which mandates "an *independent* examination of the whole record" in "cases raising First Amendment issues" (466 U.S. at 499 (emphasis added; internal quotation marks omitted))—and lower-court decisions holding that independent review is required *whenever* First Amendment protection turns on whether speech is misleading. *See, e.g.*, *Byrum v. Landreth*, 566 F.3d 442, 448 n.5 (5th Cir. 2009); *see also* Pet. App. 67a.

The government does not seriously dispute that the D.C. Circuit's refusal to conduct independent review here adds to an existing circuit split on this important First Amendment issue. Instead, the government relies on baseless diversions, arguing (i) that defendants waived the issue, (ii) that independent review would not have affected the decision below, and (iii) that this Court's ruling in *Bose* supposedly does not apply to mail and wire fraud cases. The government is wrong on all counts.

1. The government's claim that defendants waived the issue by stating at oral argument that

their challenges were legal in nature is frivolous. U.S. Opp. 28-29. Large portions of the argument, which the government tellingly does not present in its appendix, were devoted to attacking the factual underpinnings of the alleged fraud, including those that relied on the marketing of "light" cigarettes, their addictive nature, and ETS. *See, e.g.*, Reply App. 25a (Descriptors are "literally true. They're actually true.").[1] The briefing likewise was replete with similar challenges (under *Bose*) to the district court's findings of fraud, specific intent, and likelihood of future violations. *See, e.g.*, *id.* at 116a ("court erred in finding fraud relating to addiction") (capitalization altered).[2] As defendants explained in their merits briefing and again in their petition for rehearing, "many of the findings here involve constitutionally protected statements on important public controversies or proposed regulation that must be reviewed *de novo*." *Id.* at 70a (citing *Bose*); *see also id.* at 120a-25a.

---

[1] *See also* Reply App. 19a ("You don't have a scintilla of evidence along those lines with respect to addi[c]tion or ETS"); *id.* at 30a ("It is impossible, as a result of the MSA, for the government to demonstrate that there is a likely future enterprise or likely future fraud."); U.S. App. 7a ("I don't want to be misquoted as having said that I agree with the fact findings of the district court."); Reply App. 54a (same).

[2] *See also* Reply App. 74a ("the government's failure of proof under the correct [specific intent] standard requires the entry of judgment for defendants"); *id.* at 86a ("The government failed to satisfy its burden of showing how a reasonable likelihood of future RICO violations persists in the face of the MSA."); *id.* at 102a ("with respect to the alleged ETS scheme, the court erred in finding that good faith and scientifically supported statements about the health effects of ETS amounted to criminal fraud"); *id.* at 112a ("court erred in finding fraud relating to environmental tobacco smoke") (capitalization altered).

The best that might be said about the government's waiver argument is that defendants did not waste time attacking findings of ancient historical fact relating to decades-old conduct, such as whether meetings occurred at the Plaza Hotel in 1953. That hardly supports the government's claim that the findings that defendants *did* challenge are now unreviewable. "Preservation" scarcely required defendants to frame those challenges under the clearly-erroneous test of Rule 52, which they contend does *not* apply.

Indeed, if the D.C. Circuit had remotely believed that no defendant challenged the facts it easily could have disposed of the appeal on that basis. Instead, the court recognized that "[d]efendants raise[d] numerous challenges to the *correctness* of the district court's findings that they committed racketeering acts." Pet. App. 29a (emphasis in original). The court passed upon each of those factual arguments—but explicitly refused to perform independent review under the perceived compulsion of circuit precedent that narrowly construed *Bose*. *E.g.*, Pet. App. 52a (citing *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41-42 & n.3 (D.C. Cir. 1985)); *see also id.* at 16a, 28a, 49a, 50a, 52a, 53a, 61a, 64a, 65a, 66a, 67a. The *Bose* question was therefore both pressed *and* passed upon below.

2. The government is also wrong to deny that independent appellate review would have altered the outcome of this case. Not only did the court of appeals expressly say so (Pet. App. 67a), but it also upheld numerous factual findings that could not have withstood anything but the most "highly deferential" review. For example, it affirmed the district court's finding that the use of "light" descriptors was fraudulent because there are purportedly "'lights and regu-

lars of the same brands that have the same FTC tar rating.'" *Id.* at 49a (quoting *id.* at 1907a). If the court of appeals had reexamined that finding, however, the record would have compelled it to reject the district court's conclusion because the finding was premised on a flawed comparison between cigarettes *of different lengths* (Virginia Slims 100's and Virginia Slims Lights 120's). *See* Reply App. 125a. No speaker should lose its First Amendment freedoms on the basis of such manifestly flawed—and virtually unreviewed—fact-finding.

3. The government's suggestion that *Bose* is inapplicable where mail and wire *fraud* are alleged is meritless. U.S. Opp. 30. *Bose*'s holding that "actual malice" must be reviewed independently was based on the "kinship" that this element of defamation has "to English cases considering the kind of motivation that must be proved to support a common-law action for deceit." 466 U.S. at 502. It thus would be odd if the rule requiring independent review did not apply to deceit itself. *See Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 100 (1990) (plurality op. of Stevens, J.); *id.* at 111 (Marshall, J., concurring in the judgment).

More broadly, *Bose* makes clear that independent appellate review is required *whenever* the availability of First Amendment protection rests on a factual finding that separates protected from unprotected speech. The Court has emphasized that, when the "question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated[,] . . . [it] examine[s] for [itself] the statements in issue." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (internal quotation marks omitted). "[T]he exercise of this power is the process through which [First

Amendment] rule[s] . . . evolve[ ] and [their] integrity is maintained." *Bose*, 466 U.S. at 503. "In such cases"—including those involving alleged libel, fighting words, obscenity, and child pornography—"independent review of the record" is required "to be sure that the speech in question actually falls within the unprotected category." *Id.* at 505. Fraud also generally falls outside the First Amendment's protections (*see* U.S. Opp. 35)—but before speech can be definitively relegated to this unprotected status, appellate courts must independently examine the factual findings to ensure that the speech is indeed fraudulent.

In fact, in the context of political speech, which is also at issue here, even deliberately false speech is protected. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961). That factor also supports review, because the government does not deny that the D.C. Circuit's contrary holding conflicts with other circuits' decisions applying *Noerr-Pennington* to deliberately false statements. *Compare* Pet. App. 44a, *with Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000). The fact that the decisions applying *Noerr-Pennington* to deliberately false speech have arisen in the antitrust—rather than the RICO—context is irrelevant because the antitrust laws served as the model for RICO. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151-52 (1987). Moreover, as the government itself concedes, the *Noerr-Pennington* doctrine stems from First Amendment concerns that apply equally in both the antitrust and RICO settings. U.S. Opp. 48.

II. Review Is Warranted Because The Court Of Appeals Overstepped Its Jurisdictional Bounds.

The government's effort to reconcile the decision below with the statutory and constitutional limitations on courts' RICO jurisdiction is equally unconvincing.

1. The government rests its defense of the court of appeals' atextual definition of an "associated in fact" enterprise on *Boyle v. United States*, 129 S. Ct. 2237 (2009). But *Boyle* confirms that, *even if* RICO's definition of "enterprise" can be supplemented to include entities not "specifically enumerated" in the text, those entities must fall "within the *ordinary meaning* of the term." *Id.* at 2243 n.2 (emphasis added). Groups of for-profit corporations that fiercely compete with each other for business—while informally associating through trade organizations to influence government policy—do not remotely fall within the "ordinary meaning" of an "enterprise."

The government offers virtually no response to this argument, but instead directs most of its attention to the threshold statutory argument (advanced in greater detail by Lorillard) that RICO's text precludes *all* corporations (whether competitors or affiliates) from forming associated-in-fact enterprises. U.S. Opp. 15-27. But the government is wrong on that too, because it has no good answer to the single most powerful indication of Congress's contrary intent: While RICO expressly *includes* corporations within the definition of legal entities that by themselves can constitute an enterprise, it *omits* groups of corporations from its enumeration of non-legal entities that can constitute an "associated in fact" enterprise. 18 U.S.C. § 1961(4). That purposeful omission

is fatal to the government's case. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *Samantar v. Yousuf*, No. 08-1555, slip op. at 10-12 (June 1, 2010).[3]

2. The government also fails to reconcile the decision below with the limitations that RICO and Article III impose on district courts' jurisdiction to issue injunctive relief.

Section 1964(a) authorizes injunctive relief only when it "prevent[s] and restrain[s]" likely future *RICO* violations. 18 U.S.C. § 1964(a). Article III limits injunctive relief to cases in which there is "a realistic threat" that the challenged conduct will recur in "the reasonably near future." *City of Los Angeles v. Lyons*, 461 U.S. 95, 106 n.7, 108 (1983). In light of the MSA and FDA Act, however, there is no reasonable likelihood that PM USA will commit any fraud in the future. Moreover, apart from the unlikelihood of any fraud, there can be no RICO violation of any kind without a statutory enterprise, and the MSA and FDA Act together prohibit future joint racketeering activity of the type that the government alleged as the "enterprise" here. *See* PM USA Pet. 28-29. At a minimum, a GVR is appropriate so the question raised by the intervening FDA Act can be explicitly passed upon by the D.C. Circuit, which has improperly refused even to consider the effect of that new law.

---

[3] The trade associations, TI and CTR, obviously were corporate "enterprises" under RICO, but they were defunct by the time this case was tried and thus could not support a RICO claim solely for *prospective* relief under Section 1964(a). That is why the government manufactured the atextual "enterprise" it used here.

Citing *Horne v. Flores*, 129 S. Ct. 2579 (2009), both the government and intervenors assert that, in the first instance, PM USA should seek modification of the injunctions from the district court. U.S. Opp. 55; Int. Opp. 5. But *Horne* involved a *collateral* attack on an existing injunction (129 S. Ct. at 2588), not the obligation of appellate courts to apply the law as it exists on direct review. *Horne* may establish that district courts retain the power to modify injunctions *even after* appeals are exhausted, but it cannot justify the refusal to properly adjudicate an appeal in the first place.

On the contrary, absent unusual retroactivity concerns, an appellate court must "apply the law in effect at the time it renders its decision." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (internal quotation marks omitted); *see also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801). No such concerns about retroactivity arise "[w]hen [an] intervening statute authorizes or affects the propriety of prospective relief." *Landgraf*, 511 U.S. at 273. Not surprisingly, this Court has long evaluated the validity of injunctions in light of legislation enacted while the injunction was being appealed. *See, e.g., Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 201 (1921). Were the government's view correct, circuit courts could simply decline to adjudicate appeals on the theory that trial courts might conform their rulings to the law in subsequent collateral proceedings. There is no basis for such an absurd view.

The government's other objections to further review of the district court's injunctions in this Court—or in the D.C. Circuit—are equally makeweight. The government points to a provision of the FDA Act stating that the legislation should not be construed

to "'affect any action pending in Federal'" court. U.S. Opp. 55 (quoting FDA Act § 4(a)). That provision, however, does not amend RICO, which already limited the district court's jurisdiction to the issuance of injunctions that "prevent and restrain" likely future RICO violations; nor could it alter the restrictions that Article III imposes on the court's jurisdiction. The fact that some petitioners—but not PM USA—have challenged a *few* provisions of the FDA Act is irrelevant because the statute is presumed to be constitutional. *Illinois v. Krull*, 480 U.S. 340, 351 (1987). Finally, the fact that the FDA Act does not impose the same "tailored remedies" as the district court's injunctions (U.S. Opp. 56) is irrelevant because the jurisdictional question is not whether the MSA and FDA Act impose the *same* remedies as those injunctions but whether their regulatory requirements extinguish any reasonable likelihood that defendants will engage in future *joint* racketeering activity. The answer to that question is plainly "yes."[4]

III. REVIEW IS WARRANTED BECAUSE THE INJUNCTIONS ARE INCONSISTENT WITH FED. R. CIV. P. 65(d) AND THIS COURT'S PRECEDENT.

The D.C. Circuit upheld the district court's vague and overbroad "obey the law" injunctions on a ground expressly foreclosed by the text of Fed. R. Civ. P. 65(d): by "read[ing]" them "in the context of the district court's . . . 4,088 findings of fact." Pet. App. 74a.

---

[4] The alleged violations of the MSA, which have never been examined under *Bose*, do not include a single example of joint racketeering activity by defendants after the MSA went into effect.

The government does not even argue that this "context[ual]" approach was consistent with Rule 65(d). It instead emphasizes that it was the *court of appeals*—rather than the district court—that belatedly attempted to salvage the injunctions by construing them in light of those voluminous findings, and that the requirements of Rule 65(d) are therefore irrelevant. U.S. Opp. 59. But a court of appeals cannot uphold a procedural order on a ground forbidden to the district court itself because the policies that animate the Federal Rules of Civil Procedure apply "equally to the courts of appeals." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989).

The district court's injunctions cannot possibly be squared with those policies. The injunctions—which, among other things, broadly prohibit defendants from engaging in racketeering acts (Pet. App. 2069a)—could encompass a virtually infinite array of conduct. *See* 18 U.S.C. § 1961(1) (listing more than 100 activities that could constitute "racketeering"). Nothing in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)—or any other decision of this Court—authorizes such boundless injunctive relief. U.S. Opp. 59. While *McComb* held that an FLSA injunction need not specify the name of each covered employee or the exact wages owed to each employee (336 U.S. at 194), defendants are not seeking anything close to that level of precision. What they are seeking—and what Fed. R. Civ. P. 65(d) and this Court's precedent mandate—is "reasonable detail" about the conduct that could potentially expose them to contempt sanctions. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Such detail is nowhere to be found in the district court's open-ended order.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MIGUEL A. ESTRADA
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner

June 7, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, and TOBACCO-FREE KIDS ACTION FUND, et al., Intervenors, v. PHILIP MORRIS USA, INC. (f/k/a PHILIP MORRIS, INC., et al., Defendants-Appellants.	No. 06-5267, et al.

Tuesday, October 14, 2008
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CHIEF JUDGE SENTELLE AND CIRCUIT JUDGES TATEL AND BROWN

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

MICHAEL A. CARVIN, ESQ.
MIGUEL A. ESTRADA, ESQ.

ON BEHALF OF THE APPELLEES:

MARK B. STERN, ESQ. (DOJ)

ON BEHALF OF THE INTERVENORS:

HOWARD C. CRYSTAL, ESQ.

* * *

PROCEEDINGS

THE CLERK: Case number 06-5267, et al., United States of America, et al v. Philip Morris USA, Inc., formerly known as Philip Morris, Incorporated, et al.; British American Tobacco Investments, Limited, Directly and as Successor to British American Tobacco, Company, Limited, Appellant; The Council for Tobacco Research - USA, Inc., et al. Defendants' opening argument, liability including issues related to light cigarettes, Carvin and Estrada; likelihood of future violations and remedies, Mr. Estrada.

ORAL ARGUMENT OF
MICHAEL A. CARVIN, ESQ.
ON BEHALF OF THE APPELLANTS

MR. CARVIN: May it please the Court, Michael Carvin for appellants. I will be, as was just indicated, dealing with the liabilities issues other than lights, and I've been allotted 25 minutes.

I'd like to begin with what I –

JUDGE SENTELLE: You're a little hard to hear. I don't know if the fault, dear Brutus, is in our stars or ourselves, but do the best you can to –

MR. CARVIN: Is this any better, Your Honor? Well, I'll increase my volume. How does that sound?

I want to begin with what I think is the first fatal threshold flaw in the liability, which is that the District court applied a theory of specific intent under the fraud statutes, which is plainly erroneous. She used the collective corporate intent model, which even the government now concedes on appeal is completely contrary to this Court's decision in Saba and otherwise contrary to law. In a complete reversal of the argument they made below, the government now admits that you need to analyze specific intent in terms of the individual corporate spokesperson. You need to analyze whether or not he or she said something that was contrary to what he or she knew or believed, not whether it was contrary to the collective corporate knowledge of the entire corporation or the enterprise as a whole.

Recognizing that their entire case was therefore tried on a theory that's contrary to this Court's decision in Saba, the government, with incredible hutzpa, now comes to this Court and pretends that Judge Kessler agreed with us, and she agreed that specific intent cannot be established by looking at the collective knowledge of the corporations of the enterprise as a whole. But that's completely contrary to her opinion, including the very title of this

section of opinion, at A3310, which says specific intent may be established by the collective knowledge of each defendant and of the enterprise as a whole.

She goes on and repeats that erroneous formulation at least six times, including in the sentence following her discussion of what she referred to as the Delphic footnote in Saba, where she in terms, quote, rejects the theory of specific intent which defendants advocate, i.e., requiring that a corporate state of mind can only be established by looking at each individual corporation at the time he or she acted. In other words, she rejects –

JUDGE TATEL: I see your point. I mean, she did, the District court did recite in several places the wrong standard. But elsewhere, she seems to have gotten it right. For example, she says, the findings of fact are replete with examples, are replete with examples of representatives of each defendant, of CTR, and of the Tobacco Institute, either willfully stating something which they knew to be untrue, or recklessly disregarding the facts. And then she lists many individuals, and the record is full of these examples, of corporate officials making statements that based on the knowledge of the evidence existing in the company, they should have known were false. And that's what she attributed to the corporation.

MR. CARVIN: I know I must –

JUDGE TATEL: Is that not accurate?

MR. CARVIN: No, it's inaccurate, Your Honor, respectfully, for two reasons. Number one, she never made any credibility findings about whether our corporate spokespersons or CEOs knew something that they didn't believe because that –

JUDGE TATEL: But couldn't she, couldn't she do that on the basis of circumstantial evidence?

MR. CARVIN: Absolutely, if she had ever –

JUDGE TATEL: Right.

MR. CARVIN: – looked at it. But she never looked at it, because the issue was never joined. The issue was never joined because from the beginning of this case, at its opening statement and in its pre-trial statements, the government said they weren't going to –

JUDGE TATEL: Well, look. Let me give you an

MR. CARVIN: – try, I'm sorry.

JUDGE TATEL: Let me just give you an example. Finding 736.

MR. CARVIN: Yes.

JUDGE TATEL: This is a 1971 Face the Nation interview.

MR. CARVIN: Yes.

JUDGE TATEL: Quote, it's true that babies born from women who smoke are smaller, but they are just as healthy as babies born to women who do not smoke.

MR. CARVIN: Yes.

JUDGE TATEL: Some women would prefer to have small babies.

MR. CARVIN: Right.

JUDGE TATEL: And the District Court found that that was directly contradicted by information that the vice-president for research gave the CEO two years earlier.

MR. CARVIN: And I am saying if she had done that kind of connect the dots on the fraud that was alleged here, there was no fraud arguing that we were lying about the effects of mothers, pregnant

mothers on their babies. There was arguments that we were lying about the effects of secondhand smoke –

JUDGE TATEL: Well how about this –

MR. CARVIN: Sorry. But just to make –

JUDGE TATEL: Go ahead.

MR. CARVIN: – the point –

JUDGE TATEL: I'm sorry.

MR. CARVIN: – there was no kind of connect the dots there because in this part of the opinion where they claim she had made this credibility determination, which is at page 3236 of the opinion, first of all, is not even in the part of opinion discussing specific intent. But more important, she finds that these statements were untrue because they were making statements which were inconsistent with the internal knowledge and practice of the corporation, itself, not of the internal knowledge and practice that they knew about. She goes –

JUDGE TATEL: But aren't those related? I mean, isn't, isn't she saying that because there are high officials of the corporation, they would know about the research that was inconsistent with the statements? In other words, she isn't saying this is corporate knowledge. She's saying it's knowledge they directly have because they are senior officials, and this is the research product of the corporation.

MR. CARVIN: No. No, Your Honor.

JUDGE TATEL: No?

MR. CARVIN: She says precisely the opposite at least four times. At page 3313 of the joint appendix, she says, corporations should be held liable when the totality of circumstances demonstrate that such cor-

poration collectively knew what it was doing or saying was false, even if it is impossible to determine the state of mind of the individual agent or officer at the time. She goes on to explain why that would be a horrible burden to impose on plaintiffs. Again –

JUDGE SENTELLE: Where are you now? What's the –

MR. CARVIN: This is also from 3313 of the joint appendix. She said that would create an insurmountable burden for plaintiff in the corporate mail fraud wire cases and frustrate the purposes of the statute. She goes on to explain again, same page, indeed if it were otherwise, defendants could avoid liability by simply dividing up duties to ensure that fraudulent statements were only made by uninformed employees. She obviously did not apply a standard that she thought would create an insurmountable burden for plaintiffs, frustrate the purpose of the statute, and allow, allow a huge loophole were guilty corporations could be found liable.

In the very page following what you would refer to about her absurd to believe statement –

JUDGE BROWN: Well –

MR. CARVIN: – on 3237, she says, when a spokesperson of a large, sophisticated corporation makes statements of what defendants now characterize as opinion, but which can be proved false by information that was available and known to the corporation at the time, the company cannot be permitted to escape liability, merely because a decline to inform that individual spokesman that his or her statement was misleading.

JUDGE TATEL: I guess I don't, I guess I don't understand why. I get your point about her statements about collective knowledge, and those are not

accurate. But that statement could easily be read as the District court saying based on, because they are senior officials, they would have known about the research that the corporation undertook, which she calls corporate research, which is what it is.

MR. CARVIN: That's fine.

JUDGE TATEL: And you don't, you wouldn't have a problem with that, right?

MR. CARVIN: If it was true.

JUDGE TATEL: So it wasn't the fact that she, is the problem that there isn't a sentence which says, I find that statement, well let's just take an example here. Okay. Finding 777. This is the RJR chair on Nightline. He says, it is not known whether cigarettes cause cancer. As a matter of fact, there are studies conducted over years that would say that science is still uncertain. Okay?

MR. CARVIN: Right. What she did not do –

JUDGE TATEL: So now I think that what you think is missing there is a next statement which says, RJR had internal research that this CEO knew about, and that therefore, this statement is fraudulent?

MR. CARVIN: Not only is that –

JUDGE TATEL: Is that what's missing?

MR. CARVIN: Not only is that missing, she disavows the need to connect the dots up that way.

I want to make three points. Number one, I think it's probable, or certainly possible, that they could have cobbled together some kind of specific individual intent on the notion that the denials for smoking causes disease were indeed contrary to what the CEOs knew. But they didn't try and make that

argument because they knew they couldn't make the case with respect to ETS, addition, lights or any of the other frauds that actually matter in 2008. Because there's not one example in that 1,700-page opinion, for example, where anybody in the entire enterprise over 50 years said that we do think it's established that ETS causes disease. And so they knew that if they tried to make the argument on causation, that they couldn't do it.

JUDGE TATEL: Well –

MR. CARVIN: So what did they do, for example, with addiction? What is their example on addiction? It's that the Tobacco Institute knew that smoking was addictive. Why? Because they had some corporate CEOs on the Tobacco Institute Board who knew.

JUDGE TATEL: Right.

MR. CARVIN: Why? Not because they'd ever seen it or agreed with it, but because some unnamed employees of the corporation presumably believed it. So she is imputing –

JUDGE TATEL: But wasn't –

MR. CARVIN: – to the Tobacco Institute –

JUDGE TATEL: But wasn't –

MR. CARVIN: – the knowledge of corporate employees with whom they've never come in contact.

JUDGE TATEL: See I read it –

MR. CARVIN: That is absolutely, in a criminal statute, impermissible.

JUDGE TATEL: I read it as her saying the senior corporate leaders who were on the board of the Tobacco Institute knew of the research that their own companies had done.

MR. CARVIN: Yes. And there was no research. She found that the research in 1998, that the tobacco industry had paid sparse attention to the question of addiction. There was no research that said, smoking is addictive.

JUDGE TATEL: Well there could have been –

MR. CARVIN: There couldn't have been –

JUDGE TATEL: Not at the Tobacco Institute, but the company is –

MR. CARVIN: The company is, precisely my point.

JUDGE TATEL: And but the senior officials of the companies were on the Tobacco Institute Board.

MR. CARVIN: I totally agree with that.

JUDGE TATEL: Yes.

MR. CARVIN: Now why did the corporate CEOs know that smoking was addictive?

JUDGE TATEL: Because their company had done research on it, right?

MR. CARVIN: Because the corporation agreed that it had unpleasant withdrawal sensation. But nobody thought, including the surgeon general, until 1988, thought that smoking was addictive. And this is a perfect illustration of what I've been talking about. It's not even facts we're dealing with, it's semantic labels. So she is putting in to the minds of these people, views about semantic –

JUDGE TATEL: Okay.

MR. CARVIN: – labels like addiction that they didn't agree with it. And they were quite clear on the basis for their disagreement –

JUDGE TATEL: Can we go –

MR. CARVIN: – which was that it does create unpleasant withdrawal sensations, but we don't view that as addictive in the same sense as heroin or cocaine. So you're turning this semantic debate, the disagreement with the surgeon general, in to some kind of finding of fact.

She doesn't give one example of the thousands of corporate spokespersons who ever said something that she says they didn't know or didn't believe. In the contrary, she gives every example she gives of specific intent, which is taken directly from their post-trial brief, is this collective intent theory. And again, the reason that that's the only example she can give is because the issue was never joined at trial.

In their pre-trial brief, the government made it as clear as possible that they weren't going to try and prove it up. In addition to the opening statement, we quoted page 24 of our brief. They say, among a million different examples, when the CEOs of defendants testified in 1994 before a congressional subcommittee and denied that nicotine was addictive, and that the companies manipulated the amount of nicotine contained in the cigarettes, it is immaterial whether each of these CEOs were personally aware of the extensive information of their companies' files, that their public statements were counterfactual.

So what you have here is a theory of fraud under a statute with criminal applications that says because some statement is lurking in the corporate files, which the CEOs are either unaware of or in good faith disagree with, we are nonetheless going to hold them liable for specific intent. Well if that was true, they could have indicted them for perjury.

JUDGE BROWN: Are you arguing that specific intent cannot be imputed here because this is a criminal statute, or are you arguing that the government didn't make the case?

MR. CARVIN: I am arguing three things, Judge Brown. Number one, it can't be imputed under the civil fraud or criminal fraud, because as we know from (indiscernible) v. Ashcroft and Yellow Bus, if a statute has criminal application, and this is purely a criminal fraud statute, the rule of lenity apply. And you need to show a specific intent by the individual who would actually be going to jail.

I am arguing, number two, that the government said from the outset of this case, we are not going to try and prove that Mr. Jones or Mr. Brown, who ran these corporations, said or believed anything that was contrary to what they said or believed publicly. We are going to impute to them the knowledge of corporate employees over whom they have no control and/or never came in contact with. And yes, that under Saba, that is absolutely distortion of the basic precepts of the specific intent statute. And that, so the –

JUDGE BROWN: I can understand how Saba would support your argument that collective intent is inappropriate here, but how does it support your argument that you can't impute specific intent?

MR. CARVIN: Because that was exactly what was at issue in Saba. In other words, the only difference between collective and imputing is, I have employee A and employee B. Employee A doesn't think smoking is addictive, employee B does. You impute employee B's beliefs to employee A so when employee A says it's not addictive, you say, it's a knowing falsity. Well it's not a knowing false if he disagrees

with employee B, or he never knew what employee B thought about addiction. So how can you make that person a liar when he's saying exactly what he believes in good faith?

The Supreme Court couldn't have been clearer on this when knowledge was at issue in the New York Times v. Sullivan case. It says you can't look at what's lurking in the files of the corporation as a whole to establish malice. You have to look at what the reporter thought or the editor thought, the people who are responsible for the speech. And there is not one case, anywhere, where anyone has ever gone to jail under the fraud statute because they said something they believe, because it was contrary to what the corporation believed. And the government tried its entire case on that theory, and now they're seeking to pretend that Judge Kessler didn't file their lead and have –

JUDGE SENTELLE: Let me ask as far as this theory goes. If, and I'm not asking you to concede that this is the case, but if it's the case that the corporate record disclosed a pattern of having research done that produces evidence that's smoking is in fact addictive, that evidence is sufficiently compelling that there are internal memorandum not involving the CEO directly but internal memorandum that say, well, I guess it's addictive, and then the CEO later says it's not addictive.

MR. CARVIN: Yes.

JUDGE SENTELLE: Would you say that it would then be impossible to find from that kind of circumstantial evidence that the CEO had the necessary knowledge at the time he made the expression?

MR. CARVIN: I think that that kind of analysis is done typically in fraud cases. All you have to do is –

JUDGE SENTELLE: Yes.

MR. CARVIN: – connect the dots, and that's my entire point. They didn't connect the dots because there was –

JUDGE SENTELLE: What is it you say is lacking here when we're reviewing the District court's decision on that point? What is it you say is lacking here in the connection with the dots?

MR. CARVIN: That she imputed or assumed that the corporate CEOs agreed with knowledge lurking somewhere in their corporation or indeed at another corporation in the enterprise at a whole. What she needed to do was find it, and what she didn't do was find it, because they didn't try and prove it. All I'm asking is that you do exactly what they do in fraud cases every single day. Say, this was his part of his job responsibilities, he knew about this research and he didn't do it.

Now what if they had tried to show that with respect to ETS? The government spends four pages of its brief trying to prove up that this outfit called Imbitho (phonetic sp.) in Germany was saying things that were contrary to what Philip Morris was saying in Richmond about secondhand smoke. And what's their example?

JUDGE SENTELLE: In ETS, the government's case is not nearly as strong as it is on addiction.

MR. CARVIN: Well Your Honor, I must respectfully disagree. What, what is the issue –

JUDGE SENTELLE: You think, you think the addiction case is weak? Excuse me. You think the ETS case is as strong as the addiction case?

MR. CARVIN: I, you know, who's better, Willie Mays or Hank Aaron? They're both incredibly strong cases because addiction is, I would argue, the silliest and most dangerous aspect of the government's case. It's not a disagreement about the fact. It's a disagreement about whether you label a habit that is obviously difficult to quit, addiction or dependence. The surgeon general didn't think that it should be called addiction until he completely changed his definition in 1988. The World Health Organization and the American Psychiatric Association to this day have a different definition of addiction than does the surgeon general. She found that there's not even a consensus in the public health authorities about whether this is called addiction or dependence. I can't think of a word that has, is more of a semantic minefield and has less of a fixed meaning.

And if the tobacco companies had mislead anybody about the semantic debate, maybe they'd have an argument. But they were as clear as a bell. If you stop smoking, it makes you irritable, restless and sleepless, precisely the definition that she claims was their internal understanding, and precisely the definition that the public health authorities put forth. So we're not disagreeing about what happens when you quit smoking. We're disagreeing about what label you attach to that. And if you can engage in that kind of semantic minefield and hold people in jail, then I think you've done a tremendous disservice to the due process rights of these people.

JUDGE TATEL: Well why is it engaging in semantics?

MR. CARVIN: Sorry?

JUDGE TATEL: Why is it engaging, why is it semantics when state and see, when the CEOs say that, you know, yes, it's addictive, but it's addictive like gummy bears.

MR. CARVIN: You know, they established a cathedral around this gummy bears statement as if we were out advocating to the American public it was as addictive as gummy bears. What they don't tell you is that that statement was made in a deposition which was not communicated to the end of the public. At the end of the deposition, where a CEO undoubtedly annoyed said look, there are certain things that are addictive, like heroin and cocaine, where you have a severe physical dependence, and there's other things which don't create that kind of danger. Now if you're going to take a statement in a deposition which was never communicated to the public and call it consumer fraud, that's an example of the kind of stretching of facts that she does.

The surgeon general says alcohol is an addicting drug. Is Baccardi Rum committing fraud if they say, you know, we're not addictive like heroin and cocaine? We know what the surgeon general thinks.

JUDGE SENTELLE: I don't know. Maybe they would be.

MR. CARVIN: Maybe they would be. But do you really want to put people in jail because they don't like the politically correct terminology that the surgeon general wakes up one morning and decides he's going to impose on the American public, particularly when it's not a word affixed meaning? He found that all tobacco products, smokeless tobacco, cigars, are addictive. Can the cigar companies say, you know, we're a little different than heroin? Can the smoke-

less tobacco people say, we're not addictive in the sense that was traditionally understood? They can't make their argument in a public policy debate where regulation is hanging over their head that we really don't think the most pejorative possible label you can attach to our product is appropriate. Not only does that distort the fraud statutes beyond all recognition, I would argue it goes to core protective First American speech.

Ever since the Alien and Sedition Act, it's been quite clear you don't have to accept the government's view of the world, and this is a public policy debate that is intertwined with the kinds of example of regulation that is protected under (indiscernible) again is core protected speech.

And Your Honors, I mean, if this really bothers anybody, let's just concede we were wrong. What conceivable difference does that make in 2008? We don't call, we've agreed, call it what you want, addictive, dependence, withdrawal. We're not arguing about it anymore. Is it material to any smoker? Was there a shred of evidence that any smoker in the world used this in determining whether tobacco, purchase –

JUDGE TATEL: Why do you need evidence of that?

MR. CARVIN: Because it's –

JUDGE TATEL: Isn't the only question whether if a person, isn't the only question whether that statement, if believed, would affect a reasonable person's decision?

MR. CARVIN: I'm sorry. There's no evidence that anybody believed that.

JUDGE TATEL: No. But I'm saying why is that –

MR. CARVIN: There's no –

JUDGE TATEL: – why is that relevant?

MR. CARVIN: Because –

JUDGE TATEL: I thought you conceded that point in your reply brief, that the standard is whether, if believed, the statement would affect a reasonable person's decision to buy cigarettes.

MR. CARVIN: But I think we're confusing two different issues. You've got to prove it was believed, that, and a reasonable person would believe it. You need evidence.

JUDGE TATEL: You do?

MR. CARVIN: This is a court of law. Yes. It's an essential element of the materiality thing. It's like saying you don't have to prove specific intent. You don't have to prove materiality. Absolutely, it's a court of law. You need evidence. You can't go on what Judge Kessler's personal hunches were. And again, in a statute that has criminal application, no. You need evidence to prove it. And you need to show that a reasonable person would attach significance to it. If you define materiality as whatever any unreasonable person might attach significance to –

JUDGE TATEL: Can I, let me just –

MR. CARVIN: – then you've written materiality out of the statute.

JUDGE TATEL: Let me read you what you say in your reply brief.

MR. CARVIN: Sorry?

JUDGE TATEL: Let me just read what you say in your reply brief about this. The materiality, by

contrast, turns on whether a statement, if believed, would be important to a reasonable consumer's purchasing decision.

MR. CARVIN: Right. So let's talk about addiction. Let's assume –

JUDGE TATEL: No, no, no, wait. Well let's stick with the standard.

MR. CARVIN: Oh, I'm sorry. What –

JUDGE TATEL: That's your standard, which seems to me is correct. And there's no requirement in that standard that there be evidence that a reasonable person would or would not believe it.

MR. CARVIN: No.

JUDGE TATEL: The only question is whether if believed.

MR. CARVIN: Yes. And how do we know whether or not a reasonable person believed it or attached significance to it? The way you do that, under Brown & Williamson is, you show evidence. You do exactly what they did with respect to lights. You do public opinion surveys and say, this is how people interpreted the lights descriptives. You don't have a scintilla of evidence along those lines with respect to addition or ETS, because I submit that no rational person who knows that smoking's difficult to quit cares whether you label it addiction, dependence or withdrawal. And they've got the burden of proof, at least by a preponderance of evidence, that rational people do attach significance to this absurd semantic debate, particularly if it's going to be grounds for imposing prior restraints on corporate speech in the face of regulations.

So whatever the standard is, it needs to be supported by evidence. And I totally agree with Your

Honor that it is a reasonable person standard, not the unreasonable person standard that Judge Kessler imposed, which has no role in a consumer fraud case. It only applies if you've targeted people that you knew to be unusually gullible and would believe whatever you told them. That's not an issue in this case.

I'd also, if I might, like to use my remaining minute –

JUDGE SENTELLE: You've got one minute.

MR. CARVIN: – to make the point that her definition of enterprise is completely contrary to the language of the statute. I accept that Perholtz says you can expand the definition of enterprise beyond the statutory definition. What you can't use is a definition of enterprise which makes the statutory definition irrelevant because it overrides a specific statutory limitation. You can't have a definition of enterprise that says, individuals who are not associated in fact constitute an enterprise. By the same token, you can't change the word, individuals, to corporation. All Perholtz said was, the enterprise here, the defendants here are individuals. The enterprise is individuals. They're using the corporations as a vehicle for pushing their money around. We are not going to create a loophole in the statutory definition that Congress imposed, individuals associated in fact by exempting if a corporation was party.

JUDGE SENTELLE: Don't corporations only act through individuals?

MR. CARVIN: Precisely. So –

JUDGE SENTELLE: Well is doing great balance to the congressional definition of inclusion to say that an association of corporations which are acting

through individuals comes within the definitional section?

MR. CARVIN: Perholtz, itself, said that, Your Honor. Perholtz, itself, said under Yellow Bus, we are not reaching the question of corporations who have agents. And –

JUDGE SENTELLE: Your time's up.

MR. CARVIN: And –

JUDGE SENTELLE: Your time's up. Thank you, counsel. We'll hear from the next counsel.

Good morning, Mr. Estrada.

ORAL ARGUMENT OF
MIGUEL A. ESTRADA, ESQ.

ON BEHALF OF THE APPELLANT

MR. ESTRADA: Thank you, Your Honor. And may it please the Court. My name is Miguel Estrada. I'm counsel for Philip Morris USA, and I, and I will speak on behalf of all defendants to the lights issue, the future violations issue, and the remedies issue.

Let me start with the lights. The government's position in this case is that it is perfectly lawful for the defendants to tell a consumer that a pack of cigarettes has per cigarette 16 milligrams of tar under the FTC measure, and that another pack has 11 milligrams of tar, but that it is criminal fraud to tell the consumer that 11 is lower than 16. To call this position incomprehensible, as Judge Alito did in the argument last week, doesn't quite do it justice. It is now the case, and it has never been the case, that the use of descriptors is fraudulent or even false because they correctly characterize the outcomes of the FTC-authorized tests since 1966.

Now the government's theory in the case, and which Judge Kessler accepted, is entirely this. This would not be fraud. This would not be false but for compensation. Because of the fact that a consumer may puff more deeply or smoke more cigarettes, this has now become fraud. Now this was –

JUDGE TATEL: Well isn't her, isn't her reason for that that the, that the companies knew that? When, in other words, when they said, when they say that it's a low-tar cigarette, they knew, based on their own research, that in fact it wasn't because of compensatory smoking?

MR. ESTRADA: I did not hear the first part of the question.

JUDGE TATEL: Oh, I'm sorry. Is this better? My question was, didn't the, didn't the District court say that extractly, the phrase low-tar is not inaccurate, but that based on the company's own research about compensatory smoking that they knew that in fact they weren't low-tar because of the way smokers compensate?

MR. ESTRADA: See but –

JUDGE TATEL: That's her theory, right?

MR. ESTRADA: Yes. And that's exactly right.

JUDGE TATEL: Yes.

MR. ESTRADA: At finding, I believe, 2068, she explains that the way consumers compensate is by puffing more deeply on the one hand or smoking more cigarettes.

JUDGE TATEL: Right. And the companies –

JUDGE SENTELLE: (Indiscernible.)

JUDGE TATEL: Yes, and the companies knew that based on their own research.

MR. ESTRADA: Everybody knew it, Judge Tatel. That's, that's the problem.

JUDGE TATEL: Well but the point is, the point is in terms of whether it's fraudulent or not –

MR. ESTRADA: Well but –

JUDGE TATEL: – if the companies knew it –

MR. ESTRADA: – but on that, we can go to the record. I mean, on the one hand, just as a matter of law, it is unreasonable to say that a consumer could think that, that he would get the prescribed amount solely on the basis of, of smoking more units of the product. And the fact is, in 1966, and this is in the record, when the FTC was conducting hearings on this issue, the companies did tell the FTC that a smoker might be compelled to get his nicotine fix by smoking more, and that's Joint Exhibit 47, 48 –

JUDGE TATEL: Right.

MR. ESTRADA: – at page 131. This was known in 1966. Now on whether consumers would puff more deeply, the issue has been sort of speak, ventilated ad nauseam in this courthouse. The Brown & Williamson litigation came here in 1983. You may recall that the whole issue in the litigation was compensation. And both the FTC, Judge Cazelle (phonetic sp.) and this Court were fully aware that compensation was going on and that there were two types of it. You could smoke more or take deeper puffs. And the FTC, Judge Cazelle and this Court all said, it is irrelevant because everybody has known from 1966 that the point of the system is to tell the consumer how much tar they would get compared to another cigarette if they smoked the two cigarettes in the same way. It was never from the get-go any sort of a claim, by the agency mind you, that, that this was, that any of these numbers had any bearing

on the amount of tar or nicotine that a, that a consumer would get.

JUDGE TATEL: Is there, is there a difference in your, is there a difference between, I, I think your point about low tar. Your point there is that low tar reflects the actual numbers, right? Low tar identifies cigarettes that in fact have low tar, correct?

MR. ESTRADA: Yes.

JUDGE TATEL: But what about, what about the phrases like, like light? And I ask that because of the District court. The District court has this finding. She says, there are lights of certain brands with higher tar levels than regulars of other brands from the same company. And there are also lights and regulars of the same brand that have the same FTC tar rating. Now so what she's saying there is that these, that the labels, light, are being used inconsistently, that they don't always reflect low tar.

MR. ESTRADA: Well I think there –

JUDGE TATEL: Is that, by the way, you don't challenge that fact finding, do it?

MR. ESTRADA: We haven't challenged any fact –

JUDGE TATEL: Right.

MR. ESTRADA: – any fact finding, Judge Tatel.

JUDGE TATEL: Okay. So that, that's a fact finding –

MR. ESTRADA: (Indiscernible) arguments are purely legal.

JUDGE TATEL: Yes.

MR. ESTRADA: The key point about something like lights is that there is, that no consumer gets the same message from hearing, lights.

JUDGE TATEL: No, but in terms of, you were saying that the labels accurately describe –

MR. ESTRADA: But they do, and that's the point –

JUDGE TATEL: – the level. Let me, let me just finish. You say the labels accurately describe the tar level in the cigarettes, but here, you have a finding that that's not the case, that they are inaccurate.

MR. ESTRADA: Well, no. Whether they are accurate or inaccurate I would think is a legal conclusion. But in fact, the finding is –

JUDGE TATEL: Well let me go back. I thought you said they're just, they're, they're just true. They are literally true.

MR. ESTRADA: They are true.

JUDGE TATEL: That's your argument.

MR. ESTRADA: They're literally true. They're actually true.

JUDGE TATEL: But, but here, here you have a finding. Here you have a finding that you haven't challenged which suggests that's not the case.

MR. ESTRADA: Well because what, what is going on with lights as opposed to low tars, that lights are a particular kind of low-tar cigarette. And what lights do accurately describe is that they are, that they have lower tar than the regular pack of the small brand, and also have, have also the meaning that –

JUDGE TATEL: Well actually, that's inconsistent with this finding.

MR. ESTRADA: I don't believe so, because I don't believe she was making any findings as between brands. But in any event, it also conveys a taste

message. And of course, look, we have a large, a dispute in the District court on the question of whether, whether the defendants intended a health message or a taste message. Our position is that we intended a taste message. Of course, the –

JUDGE TATEL: You, I'm sorry. You said, say that again.

MR. ESTRADA: That we intended a taste message.

JUDGE TATEL: A taste message.

MR. ESTRADA: Of course. Given that the entire system of low tar descriptors was set up by the FTC for the purpose of encouraging the American public to smoke low-tar cigarettes if they could not quit, it is incontestable that some consumers obviously got a health message. But that's not inconsistent with a label like, lights, to have a dual message, and some consumers would take away that it's a milder smoking experience than the, I don't want to say harsher, say red pack. But also –

JUDGE SENTELLE: More full flavored is the –

MR. ESTRADA: Right.

JUDGE SENTELLE: More full flavored is the phrase that was used in –

MR. ESTRADA: And I will, and I will point out, Judge Sentelle, that in connection with that, when Judge Kessler, herself, was engaging in her conclusions of law, she, herself, used the contrast between the low tars and lights –

JUDGE SENTELLE: She uses the phrase, full flavored, yes.

MR. ESTRADA: – the full flavor cigarettes.

JUDGE SENTELLE: I wasn't just, I wasn't just referring to my own experience on that. (Indiscernible.)

JUDGE TATEL: But there's also –

JUDGE SENTELLE: I think we've –

JUDGE TATEL: Excuse me.

JUDGE SENTELLE: Do you have more?

JUDGE TATEL: About this subject? Yes.

JUDGE SENTELLE: I was going to say, that was the end of the, (indiscernible) the end of the time on this subject.

JUDGE TATEL: Oh, can, let me just –

JUDGE SENTELLE: If you have more questions –

JUDGE TATEL: I'll just finish my question. I was going to ask him about the, the finding at 2591, which is a memo from one of the companies, I think it's BATCo, which refers to light as a quote, health reassurance label.

MR. ESTRADA: Right. And I think that that's perfectly consistent –

JUDGE TATEL: Health reassurance.

MR. ESTRADA: It is perfectly consistent with what I just said, Judge Tatel. I think the entire FTC system was set up to convey to the consumers that if these items were smoked in the same way, they would not be as unhealthy as the regular cigarettes. And from the get-go –

JUDGE TATEL: I see.

MR. ESTRADA: – the condition of that was that you could not make collateral health representations, other than the fact that there, that they are low tar.

JUDGE TATEL: Just one more question. I don't want to take you too much over your time. But you do argue that with respect to light and the other descriptors, that the FTC has approved these, right?

MR. ESTRADA: We do.

JUDGE TATEL: Yes. Now shouldn't –

MR. ESTRADA: But it's not –

JUDGE TATEL: – shouldn't we, why should we decide that? Shouldn't we just wait to see what the Supreme Court does?

MR. ESTRADA: Well, there are two issues. There are two issues in the Supreme Court. Judging from the argument, one would never know –

JUDGE TATEL: But I wasn't there, so. But it is possible that they'll have to address this question.

MR. ESTRADA: It is possible. I think it's unlikely.

JUDGE TATEL: You mean because they'll do it on express preemption?

MR. ESTRADA: Because it's a secondary issue in the case. I mean, there is a, an issue that will –

JUDGE TATEL: But if it's, but if it's just possible given the timing of the Supreme Court argument, why should we wrestle with that question when we may get clear direction from the Court?

MR. ESTRADA: Because whether the FTC authorized or was indifferent to our use of the descriptors, there would still be an accurate representation of the system that the FTC undoubtedly still has today. And my last point on that, Judge Tatel, is if you keep in mind what the time line in this case has been, monograph 13 came out in 2001. It took the FTC until last month even to think about rejiggering

the descriptor system. If it is indeed true that the government believes its theory of fraud, the most minimal regard for the public safety might have impelled them to think about it sooner, say, eight years ago.

And that point leads me to my ending point about lights, which is that as one of the justices said, I think, quite aptly last week. If there has been a fraud on lights, it was a fraud that was committed by the FTC.

Let me turn –

JUDGE SENTELLE: You'll have 12 minutes on the likelihood of future violations, Mr. Estrada.

MR. ESTRADA: Yes, Your Honor. Let me start just by pointing out something that I think is sort of a big picture item under future violations. When the government announced in 1999 that they were going to bring a RICO case against the tobacco industry, they had three choices under RICO. Number one, §1962, old-fashioned criminal case, jury trial, cumbersome procedural protections. You could never try in a criminal case the type of trial that was (indiscernible) in the District court in this case, and the government passed on the criminal.

There was 1964(c). Pay us cash. The government, I think, is not a proper plaintiff under, under 1964(c), and you have some causation issues, as well.

So that left the government with a single choice and the choice they took, which is 1964(a). But as this Court pointed out in the (indiscernible) case, the choice has consequences, because this is a statute with very specific language. And the only way that the Court would have jurisdiction in the case was if the government was seeking an injunction to prevent and restrain future RICO violations, future viola-

tions of §1962. Not future mail fraud, not future unethical conduct. Future criminal RICO violations.

The government did not undertake its burden in this case. I don't think it even tried. It is impossible, as a result of the MSA, for the government to demonstrate that there is a likely future enterprise or likely future fraud. Under the provisions of the MSA, which are in the joint appendix beginning at A7158, the companies are enjoined from any joint activity in the future that could replicate the enterprise.

JUDGE TATEL: But didn't, didn't the District court decide, I see your point about the burden of proof, by the way. But didn't the District court, right before, right before she discusses the MSA, she makes specific findings that the defendants are continuing to commit RICO violations. They continue to deny that secondhand smoke is a health hazard, cigarettes are physiologically addictive, that they manipulated nicotine. She, she has a specific finding on that and –

MR. ESTRADA: Right.

JUDGE TATEL: – there is no burden of proof problem there.

MR. ESTRADA: Well, I mean –

JUDGE TATEL: She got that one –

MR. ESTRADA: There are two answers –

JUDGE TATEL: Yes.

MR. ESTRADA: – to that. Number one is that, what she labels a continuing RICO violation is not so because she did not identify any current enterprise.

JUDGE TATEL: She didn't what?

MR. ESTRADA: She did not identify any current enterprise. So in the very best, she could say that –

JUDGE TATEL: Wait. Is that your, is that the same as the Perholtz argument?

MR. ESTRADA: No.

JUDGE TATEL: No.

MR. ESTRADA: All I'm saying is, after the MSA –

JUDGE TATEL: Yes.

MR. ESTRADA: – with the CTR and the Tobacco Institute, and all of the instrumentalities of the enterprise, all of the means for the defendants to get together to conduct a pattern of –

JUDGE TATEL: Well you don't need formal organizations to have an enterprise. The enterprise could be continued informally, even without those organizations, couldn't it?

MR. ESTRADA: It is possible for an enterprise –

JUDGE TATEL: Well it's not just possible –

MR. ESTRADA: – to exist because –

JUDGE TATEL: – it's clear under the statute. You don't need formal corporate structure.

MR. ESTRADA: Judge Tatel, I think we're saying two different things.

JUDGE TATEL: Okay.

MR. ESTRADA: She did not find that there is currently any cooperation among the defendants to engage in any of the conduct, which if done under an enterprise, would be RICO. She found something that she believed to be fraudulent, completely unconnected to the required enterprise because there is none.

JUDGE SENTELLE: The question I would have there, counsel, and it's a rather short one I hope.

When you say that the remedy under 1964(a) is to prevent and restrain violation of §1962, would that not empower the Court to impose remedies that would restrain the various segments or elements of a RICO enterprise, as opposed to just restraining the totality?

MR. ESTRADA: Well this case, this Court already said in the previous opinion that it, that the most suitable remedy would be to separate the person from the enterprise. That's the intended remedy. And of course, yes, but it is a predicate for the imposition of that remedy –

JUDGE SENTELLE: Would it not be possible or lawful or admissible for a court under 1964(a) to enjoin the commission of predicate acts in order to accomplish the task of restraining and deterring further violations, as opposed to just enjoining commission of RICO violations?

MR. ESTRADA: Possibly. But as a predicate for that more limited injunction, Judge Sentelle, there would have to be evidence from which the Court could conclude that there is a likely future RICO violation. And if that cannot occur because the enterprise is defunct and cannot be brought back, or there's already an –

JUDGE SENTELLE: Where is this likelihood requirement drawn from?

MR. ESTRADA: Excuse me, Your Honor?

JUDGE SENTELLE: Where is the likelihood requirement drawn from?

MR. ESTRADA: Well it is both from, from equity principles and from the language of 1964(a). It is –

JUDGE SENTELLE: Well I imagine 64(a) does, does that include that likelihood requirement?

MR. ESTRADA: Well it says, prevent and restrain –

JUDGE SENTELLE: Prevent and restrain violations.

MR. ESTRADA: – violations of §1962.

JUDGE SENTELLE: Yes.

MR. ESTRADA: This Court's cases under the SEC, under the SEC statutes and ultimately the language of 1964(a) is not something that we need to win, because it remains the case that it has always been a condition for the entry of an injunction that they be a likely future, a violation. And that's what this Court, I think, said in the Savoy (phonetic sp.) case and in the First City case, and in all of those cases.

Now the government says, look, all of those cases also recognize that it is lawful and possible in an appropriate case for a court to make that finding basis on the basis of the past just recently adjudicated –

JUDGE SENTELLE: Past conduct plus the possibility of future.

MR. ESTRADA: – violations. But that does a, that is a misreading of this Court's cases, because what this Court says is that it has to be based on the totality of the circumstances. And ignoring –

JUDGE SENTELLE: What circumstance? I'm sorry.

MR. ESTRADA: Excuse me, sir?

JUDGE SENTELLE: I didn't understand what you, your adjective before circumstances.

MR. ESTRADA: It has to be based on the totality of the circumstances. And with already there is an extant injunction, and there has not been even an

effort to demonstrate that the injunctions that are already disarticulating the enterprise and that make it impossible for the enterprise to come back are not being enforced or don't cover the conduct –

JUDGE SENTELLE: Is there a time limitation on that extant injunctive relief?

MR. ESTRADA: No, there is not. The twin junctions that are most relevant here, which are the injunction (h) in the consent decree and injunction (I). (h) basically says that the defendants cannot act jointly to suppress tobacco data, and (I) says that you cannot engage in any fraud in connection with tobacco products, although both of those go in perpetuity.

And let me say that, that Judge Kessler never even asked the correct legal question, because she was persuaded by the government that the burden issue be on the defendants, not merely to demonstrate what is obvious from the MSA, but, but to show that as a result of the MSA, wrongful conduct, not even a RICO violation, wrongful, wrongful conduct was certain not to recur. And that, I think, concededly, is a wrong legal standard.

Now I will hasten to say, Judge Kessler did take some potshots at the MSA. In none of them, and this is the most singular characteristic, have anything to do with RICO. They, you know, you can look at the pages, and if anything, they show that the MSA is very actively enforced by the states, because what she had to offer was (a), you know, the government never pointed to a fraud that, that came to light and was not addressed by a state. The government pointed to things like, there were billboards, or you were using this sort of models, or you were sending ads to a magazine that may have an unduly large

youth readership. And it's a handful of examples. None of those things have anything to do with a RICO, or even mail fraud.

And so to the extent she believed that the MSA has not, has not been effective, all of her examples were completely irrelevant to the main point of the exercise, which is the likelihood of future RICO violations. As I said, they do show that the states, that the states take very seriously the task of enforcing the MSA.

She did express the fear, and I have to call it a fear, the speculative fear, that this might not continue in the future. There is no evidence for that, and none was cited. Under the MSA, which again is in the appendix, the states get $50 million just to get started on enforcement. If they bring out enforcement action and they win under the MSA, again, they get costs and legal fees. And under the MSA, again, the, the state will be getting $6 to $7 billion, and I say billion with a B, dollars, for as long as probably everybody here will live. And so, you know, the notion that the states are not willing or able or lack the resources to enforce the MSA is worse than speculation. It's speculation completely contrary to all of the available evidence.

Now let me say a word on the question of, of the remedies.

JUDGE SENTELLE: You've got 12 minutes on remedies separately, if you want to –

MR. ESTRADA: Well in that event, let me, let me just highlight one point that I cut out for space, but I think it does exemplify how trivial the District court's objections to the MSA truly are. And this is in factual finding 4064. There is a, there is an assertion that the attorneys general have contacted Philip

Morris on 40 occasions to raise a number of issues. And that, that assertion is literally true, because under the MSA, if a third party is using our marks, we are required upon notice to take commercially reasonable steps, this is, this is Article III, to make sure that the old wild west store that still has the Marlboro man takes it, takes it down. And that is what, what lies at the essence of say, for example, finding 4064. And the fact that the government has to stretch so far to find something so trivial that has so little to do with fraud of any sort, and certainly so little to do with RICO, I think is a fair representation of the weakness of their case on the future violations issue.

Now I think I have my time to go to the remedies, Your Honor.

JUDGE SENTELLE: You want to move now to the 12 minutes on remedies.

MR. ESTRADA: Thank you, Your Honor. Let me start first with the vagueness of the injunction. The defendants were enjoined, number one, from committing any act of racketeering as defined in §1961(1); number two, making or causing to be made in any way, any material, false, misleading or deceptive statement; and number three, engaging in any public relations or marketing that misrepresents or suppresses information concerning cigarettes. So if we have marketing that, quote, suppresses information concerning cigarettes, we're enjoined from doing that, and there is no way for anyone to figure out what information it is that might possibly or not appropriately be suppressed from our marketing.

Now I think you would really would be too kind to describe this as an obey the law injunction, though it is that. It doesn't comply with the requirements of

Rule 65. And it really does what this Court said in the Savoy case. It's impermissible for an injunction, which is, it places the entire, the entire conduct of the defendant's business at the peril of a summons for contempt. And this Court did not make that up in the Savoy case. It went back, it goes back to Justice Holmes' opinion in the Swift case in 1905, where Justice Holmes said that to place the entire conduct of the defendant's business at the peril of a summary for contempt was inequitable under the first principles of justice. And yet, that is what this injunction does.

Now the government has one and only one answer to that, which is the McComb case in 1949, and they say that, you know, the McComb case stands for the proposition that, that an injunction cast in statutory language may be appropriate to keep the defendant from evasions. And indeed, that's what the McComb case says. However, that argument was also in front of this Court in the Savoy case. And what this Court said was, all right, McComb shows that it is not impermissible to have an injunction that tracks a statute, but there are statutes and statutes. And as this Court put it in the Savoy case, courts would not uphold that injunction that tracks the language of a broad and amorphous statute, such as the Sherman Act. You know, the antitrust laws were the examples that this Court gave in the Savoy case. And I think it would be hard to find a statute that is more open-ended and amorphous than the RICO statute.

Now there are a couple of other things about the McComb case, which is that the actual injunction in the case was actually not all that vague or that broad. It told the defendants to pay 40 cents in wages an hour, to pay time and a half for overtime,

and to keep payroll records. That was the vague injunction in the McComb case. The alleged vagueness, if you look at page 194 of that opinion, was that the injunction had failed to name the employees by name, and did not do the math on a weekly and monthly basis. And it is, it was that failing that the Court said was, was irrelevant, because it was inconsistent with the payroll realities of the day.

Now I can see where the Supreme Court would say that when you're being told, you know, their rate, and time and a half, and keep, you know, the names in the payroll, but I don't really see why the government would think that that has anything to do with this case.

For good measure, you know, the Court in the McComb case also made quite a, quite a big deal of the fact that the defendants, while the injunction was first entered, had not bothered to take an appeal or to seek any further guidance from the District court, and had only thought of raising the vagueness of the injunction when the government sought a citation for contempt. And of course, that is not true here, as well.

Let me say –

JUDGE TATEL: Mr. Estrada, before you go in to that, can I just, I want to ask you a question about a different argument that I thought you had made as a remedial argument, which I thought was interesting. You say that the District court failed to identify which alleged racketeering acts formed a pattern of racketeering activity, and that as a result, you can't tell whether the remedy is tailored to the violation. Is that something that you're arguing, or is that something I should ask Mr. Carvin?

MR. ESTRADA: No. It's something that I'm happy to address.

JUDGE TATEL: It's a remedial issue, right?

MR. ESTRADA: Excuse me, Your Honor?

JUDGE TATEL: It's a remedial question.

MR. ESTRADA: Yes, it is.

JUDGE TATEL: You see it as a remedial –

MR. ESTRADA: And it is, right. I mean, you know, obviously, we concede –

JUDGE TATEL: Yes.

MR. ESTRADA: – that the, that the District court wrote the history of tobacco in this country in 1,700 pages. That's quite different from doing anything with respect to the specific acts of racketeering that the, that the government placed in front of the court, other than to say that I believe 4 out of 168 –

JUDGE TATEL: Well let me –

MR. ESTRADA: – were covered by Noerr-Pennington.

JUDGE TATEL: Let me just, I just have two questions about it. I mean, I thought your argument was interesting. And but, the court did find a scheme to defraud, right? It did find the existence of a scheme to defraud. And then it found that defendants had made a series of specific mailings and wire transmissions there at 3287 (indiscernible) –

MR. ESTRADA: Yes.

JUDGE TATEL: – and that all of these mailings were in furtherance of the scheme. So what more do you need, what more do we need to know that the –

MR. ESTRADA: There's a –

JUDGE TATEL: – that we need, do we need to know that the, that the list that she has, the specific set of mailings at 3287, that those are the ones?

MR. ESTRADA: Well –

JUDGE TATEL: I mean, isn't that pretty obvious?

MR. ESTRADA: Not to me. If you look at what she said in connection with her findings of fraud, it was on the one hand, the one page I believe she says, the government has proffered this pillars of fraud. Footnote, I don't find that all that useful, all that, all that relevant. Turn to page –

JUDGE TATEL: Well I wasn't asking about the footnote.

MR. ESTRADA: Well, but I think it's important to identify what findings were specifically made with respect to the allegations that are tied to the scheme, Judge Tatel. Because I think under any view of the facts, given that 1964(a) only authorizes a jurisdiction to prevent and restrain future violations. And given that this Court in the First City and other cases have said that those are generally only like violations, that is to say, those of a similar type or nature as those that had been engaged in, it is crucial to the jurisdiction of the Court that she identified not 50 years of distasteful conduct in her view, but a pattern that is tied up to the allegations of wrongdoing in a way that it can inform the judgment whether this type of wrongdoing is likely to occur.

JUDGE TATEL: And that the remedy is tailored, right?

JUDGE SENTELLE: The remedy is tailored.

JUDGE TATEL: Right. But –

MR. ESTRADA: I'm sorry, Your Honor. I can't hear.

JUDGE TATEL: And that the remedy is tailored.

MR. ESTRADA: Correct.

JUDGE TATEL: That's, that's your argument. But I'm curious about what you mean by the remedy is tailored. Look, we know, we know from the record that there's at least two predicate acts with respect to each company. We know that. And the record is full of findings on each of these other issues, or at least evidence on each of these other issues, secondary smoke, light cigarettes, addiction, and all these things. So, and, and the court found that all of those mailings, all of the mailings were in furtherance of the scheme. So don't we know all we need to know that, to determine whether the, the remedy is properly tailored here? It is tailored to the scheme that the district court found, namely a scheme to defraud smokers.

MR. ESTRADA: Except that –

JUDGE TATEL: What's missing?

MR. ESTRADA: No, that's not sufficient. I mean, if I were arguing –

JUDGE TATEL: Yes, well what's missing?

MR. ESTRADA: Well, there are no findings that are tied to whether the particular fraud actually occurred, whether, whether it was part of the pattern, and whether, and how it, how it related to the enterprise. Let me give you an example outside of the –

JUDGE TATEL: No, but she, no. But her findings are that all of these mailings and announcements were in furtherance of the scheme, and she found the scheme, namely a scheme to defraud smokers. And so it's not, and since there are at least

two RICO acts with respect to each corporation, we have enough for liability, and it's not hard to see that it's, that it's tailored to the violation she found.

MR. ESTRADA: I don't think –

JUDGE TATEL: No?

MR. ESTRADA: – that we are contending that she did not purport to find a violation at the level of generality of which you stated, Judge Tatel.

JUDGE TATEL: Right.

MR. ESTRADA: Our disagreement with it is whether the subsidiary findings that support what in essence is a conclusion are adequate for the remedy that she imposed.

JUDGE TATEL: Well give me an example of what's missing.

MR. ESTRADA: Well let me give you an example –

JUDGE TATEL: Yes.

MR. ESTRADA: – that I think maybe will clarify, maybe will not clarify. If this were a criminal case involving drugs, it would be enough for a conviction to find that a controlled substance was in the possession of the defendant. And you would say, well now you have all you need to actually sentence the defendant. As a matter of fact, there are some controlled substances, like heroin, that call for a very stiff sentence, and some controlled substances, like marijuana, that do not. And in framing an injunction that addresses the likelihood that our misconduct in the past will recur, it is highly relevant to examine not whether she concluded that generally there had been misconduct, but that the nature and quality of it be tied to the racketeering acts that were alleged by the government.

And this was not all that difficult if she had been inclined to actually find it, but I don't think she actually was, because I don't think ultimately, all of the, all of the fraud allegations that the government made, as Mr. Carvin pointed out, can plausibly be woven in to a RICO violation that, that can be projected in to the future.

To give you an example, if she found that there was a pattern of racketeering that started in 1953 that had to do with people saying, smoking is not addictive, but it's over, that would have no –

JUDGE TATEL: I'm sorry, what's over?

MR. ESTRADA: If, if –

JUDGE SENTELLE: The pattern is over.

MR. ESTRADA: If a fraud and a pattern as to addiction are over, and we're talking about historical conduct that the defendants have –

JUDGE TATEL: But she found that it's likely.

MR. ESTRADA: – misclaimed or don't dispute –

JUDGE TATEL: But she found that it's reasonably likely to continue.

MR. ESTRADA: Well, but what is reasonably likely to continue is the important point, Judge Tatel. You cannot say that just because I adjudicate –

JUDGE TATEL: But they are, but there are mailings in the record that she found in furtherance of the scheme that relate to the –

MR. ESTRADA: Again –

JUDGE TATEL: – that relate to the denial of the addictiveness of smoking.

MR. ESTRADA: Again, but there is a disconnect between the necessary findings –

JUDGE TATEL: I don't see the disconnect.

MR. ESTRADA: – as to what the government found the pillars of fraud –

JUDGE TATEL: Yes.

MR. ESTRADA: – in an analysis as to how they relate to the remedy. Because it is one thing to say that you will, you companies once engaged in a fraud in denying addiction, and another one to say that that justifies an injunction as to ETS.

JUDGE SENTELLE: If you're through with that sentence, then your time is more than up. So –

MR. ESTRADA: Thank you, Your Honor.

* * *

DEPUTY CLERK: Defendants' rebuttal/response to cross-appeal, Mr. Carvin and Mr. Estrada.

ORAL ARGUMENT OF
MICHAEL A. CARVIN, ESQ.

ON BEHALF OF THE APPELLANTS

MR. CARVIN: Thank you, Your Honors. I'd like to respond to some of the questions that came up before. First, Judge Brown, I think your colloquy with Mr. Stern on the denial of addiction illustrates as best I can why the specific intent requirement needs to be rigorously policed, so we don't allow semantic ambiguities to put people in jail. That is why every case, including this circuit in Dale has said, it is their burden to negate every reasonable interpretation of the word at issue, and nobody can argue that a reasonable interpretation of addiction doesn't include what the surgeon believed until 1988. Then you ask him, well, how did we lie? And he changes the subject. He says, well we denied dependence.

Well I didn't realize dependence was now on the glossary of the government's terms that we had to admit to. Once again, changing their theory from trial.

If you want to put us on that semantic merry-go-round, I would point out that at footnote 14, page A3243, Judge Kessler says dependence equals withdrawal. Well it's undisputed that we admitted the same withdrawal symptoms. I can't think of a better illustration of how it's absolutely impossible for us to avoid jail cells unless we acquiesce to everything that pops in to the surgeon general's head on this completely academic and historical debate.

The other point I would like to make about specific intent that we haven't gotten to, which is relevant to both ETS and addiction, is you need to show specific intent not only to lie, but a lie that's supposed to deprive a consumer of money or property. That's a requirement of the fraud statute. It's well-established. But she never found that that was our intent. In fact, every factual finding shows precisely the opposite. At page 3345 in the joint appendix, I'm sorry, paragraph 3345, page 2944, she found repeatedly that the reason we were fighting about ETS was to fend off indoor air restrictions and adverse agency findings. We were doing what Noerr-Pennington entitles us to do in a free society, stop the government from regulating us in a way that we find detrimental. It wasn't to defraud consumers, it was to fend off adverse regulation.

At paragraph 1147, A2179, she says the industry had paid sparse attention to addiction until 1988.

JUDGE SENTELLE: What JA page was that?

MR. CARVIN: I'm sorry. That was A2179. We hadn't even paid attention to the word, addiction,

until the surgeon general decided to apply the most pejorative label possible to us, and we responded in the way that any industry would in a debate concerning public policy. And there is not a fraud case anywhere in the federal reports that has ever suggested that what trade associations say with respect to public policy or to proposed regulation comes within a million miles of the fraud statutes. And even if it did, it would be core First Amendment protected activity. And I can't believe the government thinks that federal courts can impose prior restraints or penalties on that kind of core speech.

The other point, which is also related to that, is in response to Judge Tatel's question. You asked, and Mr. Stern was obviously unable to answer, where are the racketeering acts that we were supposed to be given due notice of in defending this case? Well they're nowhere in the opinion, so we don't know what the racketeering acts were. We do know that they couldn't prove a case. Why did she not in this humongous opinion just identify the racketeering acts? Because it couldn't support her injunction.

Most obviously with respect to ETS. They were limited to the 148 racketeering acts that they had appended to their complaint. Read the complaint. It's in the joint appendix. They don't mention ETS. It wasn't even a fraud theory. They don't propose any racketeering acts. And if you go to her part of the opinion where she would drop footnotes occasionally at the end of discussion on various frauds, this would be at A3255, see if there's any footnotes with respect to ETS that even reference the racketeering acts. It wasn't part of their case. It wasn't part of their theory. She nonetheless goes ahead and finds all these findings and enjoins us.

Nicotine manipulation. There was five proposed racketeering acts. All were connected to the 1994 Waxman hearings. She finds as clear as a bell that all of that is protected under Noerr-Pennington. Nonetheless, finds it fraudulent. Enjoins it. Enjoins constitutionally protected speech. She couldn't rely on their racketeering acts to cobble together this huge fraud theory that they've come up with, and therefore, that's why she never identified the racketeering act. Because it revealed the potemkin village that has been their case from the beginning.

The government tries to cover up the complete gaps in evidence in the fraudulent schemes by saying, well look, one fraud scheme's as good as seven. If you find that there's a fraud scheme with respect to causation in the 1960s, because the Tobacco Institute under, you know, waited way too long to admit that smoking causes disease, which we admit, then you can enjoin lights in 2008 and ETS in 2008, because they lump it together under some huge fraudulent scheme.

Well Microsoft makes it as clear as a bell that you can't enjoin something that's not illegal. They have to show that we mailed in furtherance of a scheme to defraud. Well if we had no scheme to defraud with respect to lights, ETS or addiction, you can't enjoin it. You have to tailor the remedy to the violation.

JUDGE TATEL: Was it, I thought her, I thought her findings –

MR. CARVIN: And even if, I'm sorry. Go ahead.

JUDGE TATEL: I thought her findings –

MR. CARVIN: Sorry?

JUDGE TATEL: I thought her findings on light cigarettes, its support, I felt that she did find that it, that the advertisements and press releases on and statements o light cigarettes were themselves fraudulent and related to the, and in furtherance of the scheme.

MR. CARVIN: Two points. Right. I'm just saying –

JUDGE TATEL: Right?

MR. CARVIN: – if, I'm sorry. And I'll let Mr. Estrada deal with the specifics of the lights fraud. I'm just saying, you need to find fraud with respect to lights. Their theory seems to be this humongous enterprise. If they prove a fraud theory with respect to denying smoking causes disease, that somehow, that enables the court under this amorphous concept of RICO to enjoin us on lights, a completely unrelated thing, because it all comes under the umbrella of cigarettes are unhealthy.

JUDGE TATEL: But if, but if the scheme she, the scheme she has found is a scheme to defraud cigarette smokers. That's, that's the scheme. And there are RICO predicate acts for each corporation that support that. There's at least two. Now there's other evidence of mailings and press releases that relate to light cigarettes, and she finds that all of those are in furtherance of the scheme. What more does she need to do?

MR. CARVIN: She needs to say that saying lights is fraudulent.

JUDGE TATEL: She needs to say what?

MR. CARVIN: You can't simultaneously say, no, lights is perfectly truthful and legitimate and endorsed by the FTC, but because they committed

fraud about causation, I am nonetheless going to enjoin this utterly truthful speech. That's what you can't do, and that's the absurd theory they're bringing in force. Even if basic remedial principles didn't stop courts from enjoining activity that's perfectly lawful –

JUDGE TATEL: The mailing, a mailing does not, itself, have to be fraudulent.

MR. CARVIN: No, it has to be –

JUDGE TATEL: It's the scheme that has to be

MR. CARVIN: Yes.

JUDGE TATEL: And the mailing has to be in furtherance of the scheme.

MR. CARVIN: Oh, I absolutely agree.

JUDGE TATEL: And she found a fraudulent scheme.

MR. CARVIN: But she –

JUDGE TATEL: And she, she found that the mailings are in furtherance of it.

MR. CARVIN: Judge Tatel, I fully agree.

JUDGE TATEL: What more does she need to do?

MR. CARVIN: If she found that there was a fraudulent scheme with respect to lights, obviously, she can enjoin it. What I'm saying is, if she found there was no fraudulent scheme with respect to lights –

JUDGE TATEL: She found there was an overall scheme to defraud smokers.

MR. CARVIN: But –

JUDGE TATEL: And the evidence regarding light cigarettes supports that.

MR. CARVIN: Okay. And if the evidence supporting that is wrong because it's not fraudulent, how in the world can you enjoin it? Let's assume the car companies in the 1960s lied when they were fighting with Ralph Nader about seatbelts. Is it remotely possible that a court could find in 2008 that they can't raise completely legitimate concerns about airbags and lighter trucks because of CAFÉ standards, because they all relate to auto safety? Is it remotely possible that you can impose a prior restraint on perfectly truthful speech without any finding that anybody is harmed from it?

Again, even if remedial principles didn't stop the court from expanding its jurisdiction that far, the First Amendment surely would, and that's at the core of this absurd mountain of enterprise where they find one little grain of sand and try and turn it in to an injunction that governs our behavior in 2008. I submit there's no principle of remedial, remedial jurisdiction or RICO that could possibly support that.

And Your Honor, that relates to your question about what's the problem with injecting the word, corporations, for individuals associated in fact. The first problem is, of course, that it makes nonsense of the statutory language, which should be the end of it. Because the United States admits that the word, individuals, can't include corporations because corporations are listed next to individuals. And then they say, but Perholtz lets us go beyond the language, and I'm, I agree with that for present purposes. But what it doesn't allow you to do is turn the definitional section of a U.S. code statute in to an inkblot in to which the judiciary can pour whatever it views of proper public policy are.

JUDGE SENTELLE: Let me ask you this, counsel, since you are on that subject. Suppose instead of these, five, six, seven longstanding international corporations, you have five individuals who just formed corporations the day before they get together to engage in a criminal enterprise. Can that, is that, can not that not be a RICO if each of them shows up and says, I'm Willie Brown, president of ABC Corporation? The next one is Carmen Mistillo (phonetic sp.) president of DEF Corporation? Are they shielded from RICO liability –

MR. CARVIN: That's exactly what Perholtz was concerned about. They're saying, look, the real association here is these individuals who are not going to allow the Gambino family to get off the hook because they make themselves Murder, Incorporated. That was precisely what Perholtz said, and that's fine for present purposes. You don't want to gut, you don't want to create a loophole in what Congress wanted to get at.

But here, you're not creating a loophole. These are corporations who were behind the supposed scheme, right? And this gives the government tremendous advantages. They get to attribute statements made in –

JUDGE SENTELLE: So you would make that a fact specific ruling in this case, rather than a ruling that corporations, organizations and corporations can't be encompassed by that section?

MR. CARVIN: I want you to peacefully co-exist with Perholtz, and what Perholtz said was, look, we're not reaching the situation like you, like this –

JUDGE SENTELLE: Perholtz may not be compelling this result, but it certainly has language from

Judge Borg (phonetic sp.), I guess, that portends this result, doesn't it?

MR. CARVIN: Judge Borg would have never said, no.

JUDGE SENTELLE: Pardon?

MR. CARVIN: No, my point is that. Look, the holding doesn't apply because that was individuals using corporations as vehicles. The analysis doesn't apply, because you're not avoiding a loophole in what Congress wanted to get at. And the application of the analysis –

JUDGE SENTELLE: How would we write our precedent if we go your way on that question –

MR. CARVIN: Very simple standard.

JUDGE SENTELLE: – in order to prevent the use of loopholes, the creation of loopholes in further cases?

MR. CARVIN: The general standard is, anything that's consistent with the statutory definitions is a permissible enterprise. Individuals who are using corporations as their vehicles is consistent with the statutory language. Corporations who are forming together an association fact is not at all consistent with the language.

I would adopt what this Court used in Philip Morris. What, how do you interpret the liberal construction rule under Philip Morris? You don't get narrow readings, like Perholtz avoided, but what you don't do is create something that gets in to new purposes never contemplated by Congress.

Well let's look at the legislative history of RICO. They were worried about individuals –

JUDGE SENTELLE: Counsel, none of this was contemplated by Congress.

MR. CARVIN: And you know what, that's what this –

JUDGE SENTELLE: You and I remember the actual adoption of RICO. It was aimed at the people you referenced a while ago.

MR. CARVIN: And the government, you know what, the government says, look, we've gone well beyond the legislative history. But why, why has the Supreme Court said it? Because of the language of the statute. It says, follow the language. It said it in Turkette. It said it in Scheidler. Don't worry about the legislative history. Don't start using the legislative history to change the language. Who's arguing to follow the language in this case? Us, not them. Surely, if you have neither legislative history nor language to support this grotesque expansion of RICO in to areas never contemplated, then all you're left with is judicial policy.

And I would argue that even if you're just trying to get at corporations acting badly, you don't have to adopt their extreme interpretation of RICO. If corporations are enterprises, you can sue the corporations. If two corporations get together and they form a third enterprise like they allegedly did with the Tobacco Institute here, you can go after that because that's another legal entity. You could go after the Tobacco Institute. Why didn't they allege that? Because the Tobacco Institute was a corpse the day they filed suit, so they couldn't go after a straight forward enterprise like the Tobacco Institute. They had to turn our entire industry in to something like the Gambino family, where simply because we market lights in the same way, they can attribute what

RJR said in 1953 to what PM was thinking in 1994. Well if anything was not within the contemplation of Congress, and if anything overrides a specific statutory limitation, it's turning an industry that sells a lawful product in to a RICO enterprise, simply because all they have is a trade association that's seeking to fend off government regulation.

And even if that didn't violate every normal principle of statutory construction, we are again talking about a statute with this court in Yellow Bus says is subject to the rule of lenity. And surely, people are entitled to some notice of what kind of things would be in the enterprise. And surely, the statutory language has to have some meaning.

And their position erases the statutory definition from the statute. The definition of enterprise is precisely the same with or without the statutory definitional section, and the Supreme Court is never going to allow that kind of rewriting of congressional statutes to stand, regardless of how many circuit courts have unthinkingly applied that.

Unless there are further questions, I have nothing further. Thank you.

JUDGE SENTELLE: I'm hearing none.

ORAL ARGUMENT OF
MIGUEL A. ESTRADA, ESQ.
ON BEHALF OF THE APPELLANT

MR. ESTRADA: Thank you, Your Honor. I have some quick points.

I don't want to be misquoted as having said that I agree with the fact findings of the district court. What I said is, we're bringing legal challenges to the court. Obviously, we disagree with a lot of what Judge Kessler had to say, and just because she calls

something a finding also does not make it a finding. As you know, the Supreme Court said in Pullman Standard v. Swint, you have (indiscernible) of law and fact, and if you have made a legal error in your approach to the facts, you know, the judgment may be set aside on that basis.

Frankly, after you get a trial in which 60 years of your conduct out on trial, and an appeal in which even with 119 more pages, you cannot possibly address all of that. It is the only thing that we could do to sort of bring the, the unfairness and the injustice of the whole, of the whole process in front of the court, and to highlight that this is the type of case that was tried purportedly under a federal criminal trial under circumstances that never would have been permitted if it were a criminal trial.

Let me talk about lights. And I also want to make plain that our position is that we win whether or not the FTC authorized the descriptors themselves separately from the numbers, because as we made clear at the outset, the descriptors are, are true. The basic fraud here, according to the government, is knowing basic math and telling others, and that's not a fraud. Having said that, the FTC did authorize the descriptors. There's plenty of stuff in the record. We've gone over it in our brief. Let me just read you from A4295, which is the letter from the FTC to the National Association of Broadcasters in 1967. This is, this is the commission speaking.

JUDGE SENTELLE: '67?

MR. ESTRADA: It is 1967. It is A4295.

JUDGE SENTELLE: 4295.

MR. ESTRADA: And this is what the commission said. The commission's current informant policy in regard to statements of and representations relating

to tar and nicotine content of cigarettes may be formulated as follows. As a general rule, the commission will not challenge such statements or representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the Federal Trade Commission as described in this release of August 1st, 1967. We will not challenge the statements or the, or the representations that are related.

There are consent decrees in 1971 and 1995 that we put on the record that, that expressly say in settling with one of the defendants, you, you know, if something is in fact low in tar under the FTC method, the good may be so represented.

Let me turn to future violations, because it is extremely important that we get, you know, the facts on the table. The government was flat wrong. Let me say that again, flat wrong, when it told the Court that the only permanent parts of the MSA are the dissolution of CTR and the Tobacco Institute. It is flat wrong to say that the injunctions on joint conduct and on material statements, misstatements of fact, are temporary or will go away. That is just, all of those injunctions are permanent. They are at page 87161 of the record. They say you may not get together in any form to lie about tobacco or to hinder research in to tobacco. You may not make any material statement of fact concerning the health effects of tobacco. And that goes on forever.

It has, now, you know, the government also said that the MSA was more in the nature of a damages remedy rather than the injunctive relief they seek here. Again, the injunctions are there for all to see, and I think can be read. And you know, the govern-

ment certainly has never attempted to show that they're not adequate to police the behavior that was once the enterprise on their telling.

Now the other, there are some things that are due to expire, and as you pointed out, they're the document, the depository is one, and also, the states have some inspection rights under the, under the MSA that will be, that will be phased out. Of course, even if those were not available, no one has argued that the absence of those remedies could lead to a RICO violation. But the most important, you know, the more important point is, had anybody in the room not heard of Andrew Cuomo, Eliott Spitzer? Attorneys generals get subpoenas. And if this entire case hangs on the notion that the attorney general's authority to show up unannounced and inspect renders the MSA useless, that itself shows how trivial, you know, the government's argument is on, on the relevance of the MSA.

Now on the question, maybe I'm blowing too much hot air. I'll slow down.

JUDGE SENTELLE: Maybe you're acting in concert with others on that, too.

MR. ESTRADA: Mr. Carvin made me do it. I mean, just to drive home, you know, the point that Judge Tatel made about footnote 82 of the opinion. Where the district court turned to the relevance of the MSA, sentence one, drop footnote where you would put the appropriate legal standard that the judge is using, she used a voluntary cessation standard for mootness. And she said it was incumbent upon the defendants to disprove the possibility of any wrongful conduct. Not even a RICO violation. Any wrongful conduct in the future. I think I heard the government counsel concede here that if that's what

she did, that's legally wrong. And so we start from the proposition that in assessing the impact of the MSA, Judge Kessler concededly used the wrong legal standard.

More important for our purposes, it is an error that cannot be fixed, because the government never attempted to show that the injunctions that are extant are too narrow, or that in fact, they're not enforced, or that they don't cover every possibility of the recurrence of the enterprise. There has never been even an attempt to show on the enterprise front. I understand the government's argument is, you're still engaging in conduct we don't like. We don't care that it's not a RICO violation or even if it's not a mail fraud. You might get somebody who's young, who starts smoking. And ultimately, you know, the essence of the government's case is, we don't like your industry. You do things that we don't like. We caught you at the Plaza Hotel in 1953, and on the basis of that, we're going to build a castle of injunctions that have as a basis nothing other than the executive distaste for the business of the defendants. And as Mr. Carvin pointed out, you basically put, you know, the First Amendment in to a (indiscernible). And that's not something that can be fixed on remand.

I mean, it is important to emphasize that none of the nitpicks that the, that the government persuaded the district court to accept in the MSA has anything to do with the possibility, and much less the likelihood of a future violation of RICO. Because at the get-go, for any of the schemes, there is no enterprise. There cannot be a future RICO violation to prevent and restrain. Even if the government thinks that separately, the companies are engaged in conduct that they don't like, that will be a future RICO viola-

tion. They could have indicted us for mail fraud if they thought they could prove a criminal case. The could have picked any number of other statutes. The one they picked, as I said at the outset, comes with consequences, and those have partly already been seen in the disgorgement opinion.

Let me say, as well, that even taking, you know, the continuing fraud that Judge Tatel also pointed to earlier, that is part of her findings, what ends up being described as fraud by the government and to some extent by the district judge, is, you know, the cultural revolution view of how defendants –

JUDGE TATEL: The what? I'm sorry. The what?

MR. ESTRADA: The cultural revolution view of how defendants should behave. We say smoking is addictive. We're engaged in a fraud because we do not mouth it is nicotine that is used in the smoking vehicle to convey the addiction. And if you really look at, you know the quote, unquote, findings, you find a lot of, well, the, the defendants are still engaged in wrongdoing because even though, in their Web site, they say this is the most recent learning on lights, or on ETS, give you a link. You can go read monograph 13. The defendants do not say that they agree with the government, and the continuing fraud in some of these findings. And I urge you, urge you to read them, is the governments to this day continues to refuse to expressly agree with the government beyond merely, you know, beyond merely stating things that the government disagrees with because they are inconsistent, quote, unquote, with the scientific consensus as we have come to know it. And again, that's not a basis for a future injunction.

Let me say just a final word on the, on the vagueness of the injunction. I actually think it needs

no further word, other than the ones that government counsel used. But in case anybody was not, was not closely following what he says, is that the injunction basically is an (indiscernible). It means whatever the government or the district judge might think it means later. We'll settle these details in the morning. It's sort of a Scarlet O'Hara injunction. And that is not legally appropriate under this court's cases, Wynn Network (phonetic sp.), Common Cause and certainly under the Philadelphia Marine case. From the government –

I see my case is expired.

JUDGE SENTELLE: Your time is up, and although it's late in the proceedings, I am going to take a brief recess and ask the clerk if you can see if you can get that blower –

JUDGE BROWN: Thing off.

JUDGE SENTELLE: – turned down, because I'm, I'm having difficulty hearing. I don't know if anyone else is or not, but we'll take a brief recess.

MR. ESTRADA: Thank you.

* * *

APPENDIX B

Case Nos. 06-5267, 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103
(Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

TOBACCO-FREE KIDS ACTION FUND, *et al.*,

Intervenors,

v.

PHILIP MORRIS USA INC., (f/k/a Philip Morris, Inc.), *et al.*,

Defendants-Appellants.

Appeal from the Judgment of the United States District Court for the District of Columbia

---

BRIEF FOR DEFENDANTS-APPELLANTS

---

* * *

STATEMENT OF THE ISSUES

Defendants-appellants present four sets of issues for review. The first set raises four overarching legal issues:

1. Whether the district court erred by holding that, under the mail and wire fraud statutes, a corporate defendant can have specific intent to defraud even though no agent or employee of the corporation had such intent.

2. Whether the district court erred by ignoring the plain language of RICO in holding that associated-in-fact corporations may constitute an "enterprise" under 18 U.S.C. § 1961(4).

3. Whether the district court erred by ruling that there is a reasonable likelihood that each defendant will commit future RICO violations in light of, among other things, legal restrictions already imposed by settlements with the States barring such conduct.

4. Whether the district court erred by imposing remedies without specifically identifying which alleged schemes or racketeering acts violated RICO.

The second set of issues challenges the specific schemes alleged by the government:

1. Whether the district court erred by holding that defendants committed fraud in using low tar descriptors that were authorized by the FTC and protected by the First Amendment and in enjoining the use of low tar descriptors in foreign nations.

2. Whether the district court erred by finding that statements that were neither material nor intended to deprive anyone of money or property could constitute criminal mail or wire fraud.

3. Whether the district court erred by finding fraud and imposing remedies relating to ETS and addiction where defendants' statements on those issues were legitimate expressions of opinion.

4. Whether the district court's application of the mail and wire fraud statutes violated the First Amendment where statements were designed either to petition government agencies or legislators for relief or to present the industry's views in ongoing public debates about tobacco.

The third set of issues relates to the district court's application of RICO:

1. Whether the district court erred by finding that defendants had the requisite purpose and structure to comprise a RICO enterprise and that defendants conducted the affairs of an enterprise through the alleged predicate acts.

2. Whether the district court erred by finding that defendants violated 18 U.S.C. § 1962(d) where its holding that defendants violated § 1962(c) must be reversed.

The final set of issues relates to the district court's remedies:

1. Whether the district court's order that defendants issue "corrective communications" exceeds the court's jurisdiction under 18 U.S.C. § 1964(a), and violates the Labeling Act, the First Amendment, and due process and whether other injunctive decrees violate due process.

2. Whether the district court's generalized injunctions against "false statements" and "acts of racketeering" are too vague to satisfy Federal Rule of Civil Procedure 65, the First Amendment, and due process.

3. Whether the district court erred in applying its injunctions to non-party subsidiary corporations contrary to Federal Rule of Civil Procedure 65.

* * *

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal asks whether RICO provides a vehicle for the judiciary to substitute its policy judgments for those of Congress and the FTC by imposing broad new regulations on the sale and marketing of cigarettes, masked in the form of "injunctions" to prevent future RICO violations. Such an unprecedented and radically expansive use of RICO is precisely what a growing number of courts have described as "something quite different from the conceptions of its enactors, warranting concerns over an unbridled reading of the statute." *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393, 421 (2003).[8]

---

[8] *See also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985) (same). At least one judge in this Court has also recog-

The district court was able to convert RICO into a vehicle for judicial regulation only by, among other things: (1) eliminating the requirement of proving specific intent to defraud under the fraud statutes, (2) declaring that the major corporate competitors in a legal industry could be an "enterprise," (3) inferring a likelihood of future RICO violations in the face of existing injunctions and related prohibitions enforceable by the Attorneys General of 50 States – prohibitions that already bar any conduct that could violate RICO, (4) ignoring the FTC's policy of requiring manufacturers to use the FTC's own machine method to measure and report tar and nicotine yields and the FTC's approval of the use of the descriptors "lights" and "low tar" if substantiated by that test method, and (5) holding that defendants' statements amounted to criminal fraud even though they were not designed to deprive consumers of money or property and were not material to consumers' purchasing decisions. These fundamental legal errors – and others as set forth below – distorted RICO beyond anything contemplated by Congress and require reversal of the judgment.

First, although the alleged "predicate acts" underlying the government's RICO claim were all violations of the mail and wire fraud statutes, the district court did not require any showing of "fraud" at all. The crux of any fraud claim is scienter. To establish that a corporate defendant has a specific intent to

---

[Footnote continued from previous page]

nized the dangers from an overly broad interpretation of RICO. *See, e.g.*, Sentelle, David, *Civil RICO: The Judges' Perspective and Some Notes on Practice for North Carolina Lawyers*, 12 Campbell Law Rev. 145 (Spring 1990).

defraud, the government must prove that some agent or employee of the defendant actually acted with a specific intent to defraud. *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996). The court nullified this requirement by holding defendants liable without finding that even a single person made any statement he or she believed to be false. Instead, at the government's express request, the court cobbled together the allegedly conflicting beliefs of different employees of the same corporation at different times to create a fictional "collective corporate intent" to commit fraud – an intent that was not shown to have existed in any real person.

Second, the district court converted the leading manufacturers in the United States cigarette industry into a RICO "enterprise" by adopting a type of "association in fact" never contemplated by Congress. RICO defines an association-in-fact enterprise as "any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). An industry comprised of corporations cannot constitute a "union or group of individuals associated in fact," because corporations are not "individuals" within the meaning of RICO. The court was also unable to explain or establish how these competing corporations formed a distinct "enterprise" with a separate, continuous "organization" and "common purpose" – as required by RICO. The alleged "common purpose" was nothing more than to "maximize profits for the tobacco industry" – a goal no different from the individual objective of each defendant (or any for-profit corporation for that matter). If there is to be any limitation at all on the application of RICO, parallel conduct and the existence

of a profit motive cannot possibly be sufficient to give rise to a RICO enterprise.

Third, the district court only has limited jurisdiction under § 1964(a) to impose injunctions designed to "prevent and restrain" reasonably likely future RICO violations. *See* 18 U.S.C. § 1964(a). Thus, even assuming that there *used to be* a RICO enterprise – and there was not – the undisputed fact is that all of the lobbying and trade associations cited by the court as evidence of such an enterprise were disbanded at least eight years ago and no similar organization can be reconstituted in light of injunctions and related prohibitions that are enforceable in every state under the landmark MSA and other agreements. Furthermore, the MSA and related agreements impose a broad array of additional restrictions barring fraudulent conduct, and neither the government nor the court explained how it is reasonably likely that defendants could violate RICO in the future in light of those restrictions. Because the government did not even try to satisfy its burden of proof on this issue, no § 1964(a) remedy is permissible. *See, e.g., Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351 (8th Cir. 1998). In addition, defendants long ago abandoned the positions that the government contended were fraudulent, and their public positions simply cannot be undone. Indeed, one defendant – BWTC – has since become the passive holding company, BWH. Accordingly, there is no ongoing fraudulent activity – and no likely RICO violation – to enjoin.

Further, even assuming that a future RICO enterprise could somehow exist in the face of the MSA injunctions and the government's failure to prove a likelihood of future RICO violations, all the remedies entered below are still facially improper because the

court's 1,653-page opinion never identifies which of the various alleged schemes or racketeering acts actually amounted to a violation of the mail and wire fraud statutes or RICO. Without the identification of any past or current RICO violation, a court cannot determine either whether there is a "causal connection between the conduct enjoined or mandated and the violation found," *United States v. Microsoft*, 253 F.3d 34, 104-05 (D.C. Cir. 2001), or whether any ordered relief is properly tailored to prevent and restrain a future RICO violation.

Fourth, in its disregard of the deference owed to the policy-making authority of other branches of government, the district court found that defendants' use of the descriptors "light" or "low tar" to refer to certain cigarettes' tar and nicotine yields under the FTC's mandated measurement methodology was fraudulent even though the descriptors have been expressly approved by the FTC and, indeed, even though the FTC determined that the yield measurements were so important to consumers that it *required* this information in all product advertising. By penalizing FTC-approved conduct, the court, in violation of well-established law, used a general statute to trample the specific policy and scientific judgments of an expert independent agency.

More generally, pursuant to the "specific intent" requirements described above and well-established "materiality" requirements, Congress carefully limited the reach of the fraud statutes to instances where defendants' alleged fraudulent statements were made with the purpose and effect of depriving consumers of money. Yet, the district court dramatically expanded these statutes by interpreting them as prohibiting the industry's statements made, not to induce consumers to purchase, but in response to

various public and regulatory controversies surrounding the industry. Under the court's analysis, an industry's responses to private critics or proposed government regulation, even on matters of ongoing scientific debate (such as the health effects of ETS) or matters that would not seem to affect consumers' purchasing decisions (such as denials of marketing to youth), may be subject to criminal sanctions without any evidence that the chalienged statements were made to deceive consumers or were relied upon by consumers. It is clear that Congress did not enact, and that the First Amendment would not permit Congress to enact, a law that so criminalized one side of an ongoing legislative and public debate because the industry's opinions differed from the government or "consensus" view.

Finally, in addition to the flaws described above, the district court's remedies were improper for a number of reasons. The court ordered "corrective" communications that exceed its remedial powers under § 1964(a), conflict with *Microsoft*'s holding that a defendant has a due process right to be heard on potential remedies before they are imposed, and violate the First Amendment, the Labeling Act, and due process. The court also erred in entering vague injunctions that provide no guidance other than telling defendants not to commit racketeering or engage in misrepresentations. The court then compounded these errors by applying its remedial order to nonparty subsidiaries of defendants, violating Fed. R. Civ. P. 65(d) and due process.

Reversal is necessary because this case presents an extreme example of judicial overreaching that cannot be squared with the record, precedent, or the plain language of the relevant statutes.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's rulings on questions of law, *Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001), on the likelihood of future violations, *SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994), and on its failure to provide an evidentiary hearing on disputed facts relating to the government's requested remedies, *Microsoft*, 253 F.3d at 101-03. To the extent not predicated on legal error, the district court's imposition of remedies is reviewed for abuse of discretion. *Id.* at 106.

This Court normally reviews factual findings only for clear error, but many of the findings here involve constitutionally protected statements on important public controversies or proposed regulation that must be reviewed *de novo*. In *Bose Corp. v. Consumer's Union of United States*, 466 U.S. 485 (1984), the Supreme Court stated: "In cases raising First Amendment issues, we have repeatedly held that the appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (citations omitted). In such cases, the "clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied," and "[a]ppellate judges . . . must exercise independent judgment." *Id.*; *see also Lee v. Dep't of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005); *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999); *United States v.*

Scarfo, 263 F.3d 80, 91 (3d Cir. 2001); *McCoy v. Stewart*, 282 F.3d 626, 629 (9th Cir. 2001).[9]

Moreover, to the extent that Rule 52's "clearly erroneous" standard applies, this Court should review the judicial findings "with particular, even painstaking, care," because the district court's findings were overwhelmingly adopted verbatim from the government's proposals. *S. Pac. Commc'ns v. AT&T*, 740 F.2d 980, 983-84 (D.C. Cir. 1984); *see also Valentino v. United States Postal Serv.*, 674 F.2d 56, 60-61 & n.2 (D.C. Cir 1982). Finally, the government must prove all the elements of fraud by clear and convincing evidence. *Armstrong v. Accrediting Council Con. Educ. & Training, Inc.*, 961 F. Supp. 305,309 (D.D.C. 1997); *see also Shepherd v. ABC*, 62 F.3d 1469, 1477 (D.C. Cir. 1995) ("proof of civil fraud in general . . . requires clear and convincing evidence").

---

[9] In *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), this Court stated that it was "reluctant . . . to extend *Bose*" to the FTC "false advertising" claim brought there because "*Bose* itself suggests that commercial speech might not merit the same approach as set out therein for libel cases." *Id.* at 41. That decision is inapposite here because this is a civil fraud case, not a FTC false advertising case, and the *Bose* Court expressly stated that fraud claims have a direct "kinship" to the type of defamation claim at issue in *Bose*, 466 U.S. at 502. *See also Madigan v. Telemarketing Associates*, 534 U.S. 600, 621 (2003). Moreover, the vast majority of the speech at issue here is not commercial speech like advertising, but involves statements on important public controversies and/or proposed legislation or regulation. *See infra* at IX.

ARGUMENT

PART ONE: OVERARCHING LEGAL ERRORS

To establish a RICO violation, the government was required to prove that (1) defendants were either employed by or associated with an "enterprise"; (2) defendants participated in the "conduct of such enterprise's affairs"; and (3) defendants each did so through a "pattern of racketeering activity" – *i.e.*, through a pattern including at least two acts of "racketeering" (or two "predicate acts"), the last of which occurred within ten years of a prior racketeering act. 18 U.S.C §§ 1962(c), 1961(5).

This Court need not delve into the district court's lengthy fact-finding because of four straightforward legal errors with respect to these requirements, each of which warrants reversal of the judgment. *First*, the district court's finding that defendants committed mail and wire fraud is predicated on an erroneous "collective intent" standard that has been rejected by this Court as well as every appellate court that has addressed it. *Second*, the court erroneously concluded that a corporation can be held liable as part of a RICO "association-in-fact" enterprise despite the plain language of the statute. *Third*, in concluding that defendants were likely to commit future RICO violations – a prerequisite to the injunctive relief here – the court applied an erroneous legal standard and disregarded the intervening injunctions already in place. *Finally*, the court's remedies are not tailored to any identified RICO violation.

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING SPECIFIC INTENT TO DEFRAUD

The only "racketeering activity" alleged by the government were violations of the mail and wire

fraud statutes, 18 U.S.C. §§ 1341 and 1343. JA1390. As the district court recognized, an act of mail or wire fraud requires proof of specific intent to defraud. JA3303; *see also United States v. Winstead*, 74 F.3d 1313, 1317 (D.C. Cir. 1996); *United States v. Lemire*, 720 F.2d 1327, 1334-35 (D.C. Cir. 1983). Specific intent requires the government to show that the defendant "knowingly does an act which the law forbids, intending with bad purpose, either to disobey or disregard the law." *United States v. Rhone*, 864 F.2d 832, 834 (D.C. Cir. 1989) (quoting District of Columbia Bar Ass'n Criminal Jury Instructions, No. 3.01, at 115 (3d ed. 1978)). Good faith negates any specific intent to defraud. *See, e.g., United States v. Young*, 470 U.S. 1, 32 (1985) (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in part and dissenting in part); *S. Atl. Ltd. P'ship of Tenn., LP v. Riese*, 284 F.3d 518, 531 (4th Cir. 2002). Therefore, the government must prove "a plan to obtain money by making knowingly false, material statements with the intent to defraud." *United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001); *see also Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294, 299 (7th Cir. 2003); *United States v. Mann*, 884 F.2d 532, 536 (10th Cir. 1989); *cf. Day v. Avery*, 548 F.2d 1018, 1025 (D.C. Cir. 1976) ("conscious misrepresentation of a material fact" required for common law fraud).

The government *did not even attempt* to prove that any agent or employee of defendants had such intent. Instead, the government took the tactical position that the speaker's intent was "immaterial" because specific intent could be proven through defendants' "collective knowledge":

> [O]ur proof will not focus on whether, if we are looking at a particular statement which we are alleging to be falsely and knowingly

> made, we are not going to focus on evidence that that particular [corporate] representative knew or believed the statement to be false because that's immaterial. Rather, the government's proof will rest on the collective knowledge of the defendants' corporations' officers, employees, agents and representatives.

JA9043.

The district court adopted the government's approach, concluding that each defendant acted with specific intent based on the erroneous belief that "specific intent may be established by the collective knowledge of each defendant and of the enterprise as a whole." JA3310. Indeed, at times the court used the "knowledge" of other employees long after the challenged statement was made.[10] The court's specific intent conclusion is error, and the government's failure of proof under the correct standard requires the entry of judgment for defendants.

Where, as here, the defendants are corporations, this Court and others have consistently held that the required *mens rea* must reside in a specific corporate employee:

> Within either corporation, of course, the negligent acts of employees can be fairly imputed to the corporation. Individual acts of negligence on the part of employees – without more – cannot, however, be combined to create a wrongful corporate intent. In *United*

---

[10] For example, the only evidence cited by the court that a 1975 "Quit or smoke True" advertisement (RA 37) was fraudulent was a statement by an employee 26 years later. JA2526.

> *States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 [] (1987), for example, corporate knowledge of certain facts was accumulated from the knowledge of various individuals, but *the proscribed intent (willfulness) depended on the wrongful intent of specific employees.*

Saba v. Compagnie Nationale Air France, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996) (emphasis added).

Other circuit courts agree that, to establish a corporation's specific intent, it is "appropriate to look to the state of mind of the individual corporate official or officials who make or issue the [allegedly fraudulent] statement . . . rather than generally to the collective knowledge of all the corporation's officers and employees." *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 366-67 (5th Cir. 2004); *see also Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F.2d 882, 886 n.2 (6th Cir. 1990); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435-36 (9th Cir. 1995); *Woodmont, Inc. v. Daniels*, 274 F.2d 132, 137 (10th Cir. 1959).[11] *Saba* is also consistent with the common-law rule that the state of mind necessary for liability "must actually exist in the individual making (or being a cause of the making of) the misrepresentation, and may not simply be

---

[11] *See also AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC*, 2006 WL 1206333, *3 (S.D.N.Y. May 2, 2006); *In re Apple Computer, Inc., Sec. Litig.*, 243 F. Supp. 2d 1012, 1023 (N.D. Cal. 2002); *Lind v. Jones Lang LaSalle Ams. Inc.*, 135 F. Supp. 2d 616, 622 n.6 (E.D. Pa. 2001); *Gutter v. E.I. du Pont de Nemours*, 124 F. Supp. 2d 1291, 1311 (S.D. Fla. 2000); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 803 (E.D. La. 1986).

imputed to that individual on general principles of agency." *Southland*, 365 F.3d at 366.[12]

A few cases have suggested that, when corporate *knowledge* is at issue, it can be shown through the cumulative knowledge of the corporation's employees. *See, e.g.*, *Bank of New England*, 821 F.2d at 856 (cited by the district court, *see* JA3308). Even assuming those decisions are correct, a fraudulent *intent* cannot be "created" or "inferred" where none in fact exists merely by combining the knowledge of different employees; at least one employee must be shown to have acted with the specific intent to defraud. *Saba*, 78 F.3d at 670 n.6. Indeed, *Bank of New England* itself recognized that corporate intent could be found only if a *specific employee* had the requisite intent: "[t]he bank is deemed to have acted willfully *if one of its employees in the scope of his employment acted willfully*." 821 F.2d at 855 (emphasis added).[13]

It is especially inappropriate to relax the "specific intent" requirement under criminal statutes such as mail and wire fraud or RICO. "RICO, because it has criminal as well as civil applications, must possess

---

[12] *See also In re Alpharma Inc. Sec. Litig.*, 372 F.3d 137, 149-53 (3d Cir. 2004); *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 827-30 (8th Cir. 2003).

[13] *See also Woodmont*, 274 F.2d at 137 ("while in some cases, a corporation may be held constructively responsible for the composite *knowledge* of all of its agents . . . we are unwilling to apply the rule to fix liability where, as here, *intent* is an essential ingredient of tort liability.") (emphases added); *First Equity Corp. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 260 (S.D.N.Y. 1988) (same), *aff'd*, 869 F.2d 175 (2d Cir. 1989); *United States v. LBS Bank-N.Y., Inc.*, 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990) (same).

the degree of certainty required for criminal laws." *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 956 (D.C. Cir. 1990) (en banc), *overruled on other grounds*, *Reyes v. Ernst & Young*, 507 U.S. 170 (1993). The rule of lenity requires that the intent requirement applies "only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

Here, the district court acknowledged that "the courts, including our Circuit, have uniformly rejected the theory of collective intent that the Government advocates." JA3312. Nonetheless, it erroneously concluded that "a company's fraudulent intent may be inferred from all of the circumstantial evidence *including the company's collective knowledge*." JA3313 (emphasis added). The court expressly held that it could infer corporate "intent" from collective knowledge "even if it is impossible to determine the state of mind of the individual agent or officer at the time." *Id.* Indeed, the court went even further and found intent based on the "collective knowledge" of the entire "enterprise," by imputing the knowledge of an employee of one defendant to the employee of another defendant. JA3310-11. However, there is simply no difference between the court's approach of "inferring" fraudulent intent from "collective knowledge" and the theory of collective intent repeatedly rejected by this Court and others.

Because the government made the tactical decision not to pursue proof of any individual corporate employee's specific intent, the district court did not identify *any* agent or employee of *any* defendant who acted with specific intent. Surely a few such specific examples could have been readily established if defendants truly had embarked on a 50-year-long pattern of "consciously deceiving the American public,"

particularly since the alleged "authors of the fraudulent statements" were "high level" executives who "would reasonably be expected to have knowledge of the companies' internal" contradictory statements that the executives allegedly believed. JA3314-15. Lacking such proof, the court instead pointed to, for example, TI's statements that there was an "'open question' regarding whether smoking or nicotine is addictive." JA3314. But the only thing that made defendants' executives' approval of these TI statements fraudulent, according to the court, was that "their *companies* had [collective] knowledge both that smoking and nicotine are addictive." *Id.* (emphasis added). This is just a restatement of the flawed "collective intent" standard.

The district court's rule also conflicts with basic principles of *respondeat superior*.[14] Under that doctrine, if all elements of the crime or tort are not proven as to an employee, nothing can be attributed to the principal. *Jordan v. Medley*, 711 F.2d 211, 217 (D.C. Cir. 1983) (Scalia, J.) ("[V]icarious liability of the principal can hardly be sustained if the agent was not properly found to have committed the tort."). Here, the court's approach to "specific intent" violated the *respondeat superior* doctrine by attributing intent to the corporation not based on a single employee's intent but by (1) aggregating all the knowledge of all employees of all the alleged participants in the enterprise and then (2) inferring from this fictitious collective knowledge a fictitious "intent."

---

[14] It is an open question as to whether the doctrine of *respondeat superior* even applies to RICO. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165-66 (2001) (reserving issue of whether *respondeat superior* applies to RICO).

That is, the court imputed the knowledge or beliefs of one employee to another *employee* – the public speaker – to manufacture the proscribed intent. It is grossly improper, and a violation of due process and the First Amendment, to attribute to a public speaker the inconsistent views of another cherry-picked employee in order to create a fictional proscribed intent for which the corporation is liable. *See infra* at 112-13.

The district court stated that its "collective intent" standard was necessary to prevent a corporate defendant from "avoid[ing] liability by simply dividing up duties to ensure that fraudulent statements were only made by . . . uninformed employees." JA3313. This concern is unfounded; specific intent can be established by showing that one individual knowingly or through reckless disregard caused another to make a misrepresentation. *See Southland*, 365 F.3d at 366 n.3. Thus, if someone at a corporation manufactured willful blindness in this way, it would satisfy specific intent.[15]

Nor is there any merit to the district court's fear that following the orthodox rule "would create an insurmountable burden for a plaintiff in corporate mail and wire fraud cases." JA3312-13. Plaintiffs have

---

[15] The court also found a "reckless disregard for the truth of [defendants'] public statements," but that finding was "evidence[d]" only by defendants' "statements" themselves, which the court conclusorily asserted were inconsistent with the "collective knowledge" of the defendant corporations. *See, e.g.*, JA3315-16. This, of course, simply assumes the conclusion that defendants' spokespersons knew of, agreed with, and disregarded the allegedly inconsistent statements and is just another way of stating the legally erroneous "collective corporate intent" standard.

long been required to prove corporate liability by showing that a specific employee or agent acted with fraudulent intent, yet no court has suggested that this requirement created an "insurmountable burden." The fact that the government alleged the existence of a five-decade, ongoing criminal enterprise wholly unprecedented under RICO certainly does not *relieve* it of the evidentiary requirements imposed on those seeking to establish a discrete corporate fraud.

The district court's rule would, conversely, eviscerate the specific intent requirement for corporate defendants. These defendants, like many corporations, have tens of thousands of employees with differing knowledge and differing opinions. A plaintiff will almost always be able to splice together statements by company personnel to create a conflict between the internal statements of one employee and the public statements of another, from which a court could infer a "collective intent" to defraud. But as the Seventh Circuit recently recognized, "that one or more subordinates reached one or another conclusion does not demonstrate that '[a corporation] thought' anything in particular." *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 701 (7th Cir. 2006).

Because there is no finding or proof that any individual acted with specific intent to defraud, the district court had no basis to impute any "indictable" acts of mail or wire fraud to any defendant to satisfy the requirements under § 1962(c).

* * *

III. THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD TO HOLD THAT DEFENDANTS WERE LIKELY TO COMMIT FUTURE RICO VIOLATIONS

In this civil action for an injunction, the district court has jurisdiction only to "prevent and restrain" future RICO violations. 18 U.S.C. § 1964(a). Consequently, the government was required to prove that defendants are likely to engage in "RICO violations *. . . in the future.*" *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005) (emphasis in original). Here, the court's conclusion that defendants are likely to commit future RICO violations was premised on a flawed legal standard, which allowed it to disregard the array of injunctions and other prohibitions against future violations imposed by the MSA – a "landmark agreement" entered between defendants and the States to settle lawsuits brought against the tobacco industry. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001). At a minimum, as a result of the MSA, the government was required to demonstrate exactly how future violations can be likely in the face of these existing injunctions – which it plainly did not do.

A. The District Court Applied The Wrong Legal Standard

To obtain injunctive relief, the government must prove that "a reasonable likelihood of future violations exist[s]." *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1229 (D.C. Cir. 1989); *see also SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 100 (2d Cir. 1978) (Friendly, J.). "No single factor is determinative; instead, the district court should determine the propensity for future violations based on

the totality of the circumstances." *First City*, 890 F.2d at 1228. However, "[t]o obtain injunctive relief," the government "needs to go beyond the mere fact of past violations" and "offer positive proof of the likelihood that the wrongdoing will recur." *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978); *see also Commonwealth Chem.*, 574 F.2d at 100 (same); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 15 (D.D.C. 1998) (same).

Here, the district court applied an erroneous legal standard in holding that "the requisite 'reasonable likelihood' of future violations may be established by inferences drawn from past conduct alone." JA3335. It then held that, once those past violations are established, the burden shifts to the "defendant seeking to escape a permanent injunction" to "demonstrat[e] that 'subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" JA3342 n.46 (emphasis added). The court deemed the MSA relevant only if defendants could prove that it made it "absolutely clear" that future violations were impossible.

This standard is doubly flawed. *First*, case law makes clear that, where an existing consent decree already proscribes future violations, a court cannot rely on "inferences drawn from past conduct alone," JA3334, since the existing decree imposes a legal barrier to the repetition of such conduct in the future. Section 1964(a) and the law generally presume that an existing decree or injunction *will* alter future behavior – not, as the district court presumed, that past misconduct will be repeated in defiance of an existing and enforceable injunction. *See Philip Morris*, 396 F.3d at 1198; *see also id.* at 1204-05 (Williams, J., concurring) (injunctions plus contempt

penalties "materially alter [a defendant's] readiness to persist in violations").

For example, in *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351 (8th Cir. 1998), a citizen's association sued to enjoin alleged lake pollution. A state government agency subsequently commenced enforcement actions against the same defendants, resulting in a stipulation agreement and the termination of a permit that resolved the alleged Clean Water Act violations and prevented future ones. The Eighth Circuit held that the existence of this separate relief meant that the plaintiff could not rest on allegations of past misconduct alone, but rather had to demonstrate how future violations were likely notwithstanding the intervening relief:

> In these circumstances, we agree with the Second Circuit that the claim for injunctive relief is moot unless Comfort Lakes proves "there is a realistic prospect that the violations alleged in [its] complaint will continue notwithstanding" the permit termination and Stipulation Agreement. *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991).

Comfort Lake, 138 F.3d at 355; *see also United States v. Jones*, 136 F.3d 342, 348 (4th Cir. 1998); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 475-76 (6th Cir. 2004); *Duboise v. U.S. Dep't of Agric.*, 20 F. Supp. 2d 263, 269 (D.N.H. 1998). These cases reflect the common sense "fact . . . that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 261 (1972).

Second, the intervening MSA injunctions and other prohibitions also render erroneous the district court's decision to shift the burden to defendants to prove that RICO violations will not occur in the future – and then to impose on defendants the requirement that they satisfy this burden under the "absolutely clear" test. As the two cases the court cited for that test show, JA3342 n.46, that test applies only to mootness claims based on a defendant's voluntary and non-binding cessation of the allegedly illegal conduct. *See United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).[18] The obvious purpose of this test is "to prevent defendants from defeating a plaintiff's efforts to have its claims adjudicated simply by stopping their challenged actions, and then resuming their 'old ways' once the case [becomes] moot." *Boston Teachers Union v. Edgar*, 787 F.2d 12, 16 (1st Cir. 1986). But, as *Comfort Lake* explains, this test has no application where, as here, a defendant's future conduct is already governed by legally binding relief:

> [The plaintiff] argues that [defendants] must prove it is "*absolutely clear* that the allegedly

---

[18] *W.T. Grant Co.* itself establishes that there is a basic difference in the tests for determining whether defendant's voluntary cessation renders the case moot and whether a plaintiff is entitled to injunctive relief. The Court held that the case was not moot because a defendant's "protestations of repentance and reform, especially when abandonment seems timed to anticipate a suit," do "not suffice to make a case moot." 345 U.S. at 632-33 & n.5. At the same time, however, the Court rejected the claim for injunctive relief because the plaintiff had not demonstrated the likelihood of future violations. *See id.*

> wrongful behavior could not reasonably be expected to recur." But that is the test when a defendant claims that its voluntary action has mooted a controversy . . . There was nothing voluntary about [defendants'] compliance activities in this case.

138 F.3d at 355 (emphasis in the original).[19] Because defendants' future conduct is governed by the MSA, the same is true here.[20]

More generally, the district court also erred in holding that "the requisite 'reasonable likelihood' of future violations may be established solely by inferences drawn from past conduct alone" without regard for current conditions. JA3335. The court's holding contradicts the established rule that "[t]o obtain injunctive relief," even in cases where there is no extant decree, the government "needs to go beyond the mere fact of past violations" and "offer positive proof of the likelihood that the wrongdoing will recur." *Blatt*, 583 F.2d at 1334; *see also Commonwealth Chem.*, 574 F.2d at 100. Likewise, it is "[t]he moving

---

[19] The cases cited by the court for the contrary conclusion, *see* JA3334-35 (cross-referencing *United States v. Philip Morris*, 316 F. Supp. 2d 6, 11 n.3), merely acknowledge that, absent a consent decree like the MSA, a defendant's past violations are relevant to determining the likelihood of future violations under the totality of the circumstances. *See, e.g., United States v. Local 30*, 871 F.2d 401, 409 (3d Cir. 1989); *First City*, 890 F.2d at 1228-29; *SEC v. Bilzerian*, 29 F.3d 689, 695 (D.C. Cir. 1994); *SEC v. Gruenberg*, 989 F.2d 977, 978 (8th Cir. 1993).

[20] Because the "absolutely clear" test only applies when mootness stems from voluntary cessation, it would not apply to BWH's claim of mootness, which is predicated on the fact that BWH is *incapable* of future violations due to its post-merger status as a passive holding company. *See infra* at II.B.3.

party [who] must satisfy the court that relief is needed," *W.T. Grant Co.*, 345 U.S. at 633 (emphasis added), not, as the district court believed, the defendant (much less with "absolute clarity").

As demonstrated immediately below, under the appropriate legal standard, the government did not establish the required likelihood of future violations.

B. The Government Failed To Demonstrate A Likelihood Of Future Violations

1. The Government Failed To Demonstrate How Future RICO Violations Are Likely Notwithstanding The MSA

In November 1998, defendants RJR, PMUSA, Lorillard, and BWTC entered into the MSA with the States to settle numerous lawsuits.[21] Defendants agreed to a variety of marketing restrictions and other obligations, and to pay billions of dollars to the Settling States. JA6955-80, JA6985-87. The MSA is enforced through judicially enforceable consent decrees and related agreements entered in every state.

The government failed to satisfy its burden of showing how a reasonable likelihood of future RICO violations persists in the face of the MSA. Specifically, the government failed to prove that (1) there was an ongoing or likely future "enterprise," or (2) defendants would likely conduct the affairs of that enterprise through a "pattern of racketeering activ-

---

[21] The MSA was entered into with 46 states, the District of Columbia, Puerto Rico, and four U.S. territories. Defendants had previously entered into separate but similar agreements with the four other states.

ity." Judgment should therefore be entered for defendants.

a. The MSA Prohibits A RICO "Enterprise"

Defendants cannot be reasonably likely to commit future RICO violations without a future RICO *enterprise*. In enacting RICO, Congress did not seek "to outlaw the commission of the predicate acts. It sought rather to outlaw the commission of predicate acts *only* when those acts were the vehicle through which a defendant 'conduct[ed] or participat[ed] . . . in the conduct of [the] *enterprise*'s affairs.'" *Yellow Bus Lines*, 913 F.2d at 954-55 (emphases added). Furthermore, this enterprise needs to be more than a mere loose association of individuals who purportedly committed or agreed to commit "predicate acts." Instead, the enterprise needs to have a defined "organization" or "structure," an element that this Court has emphasized "is the most difficult to show." *Perholtz*, 842 F.2d at 362; *see also United States v. Richardson*, 167 F.3d 621, 636 (D.C. Cir. 1999).

Here, the MSA's wide-ranging bans on joint activity by defendants made it incumbent upon the government to demonstrate exactly how such a requisite future RICO enterprise – and hence future RICO violations – could exist in spite of those bans. The government and district court completely failed to do so.

To the contrary, the district court found that "in terms of formal organization," the purported "enterprise" operated through TIRC, which later became

CTR and TI. JA3265-66.[22] The court further ruled that various committees and subcommittees of these organizations provided "structures of varying degrees of formality" through which the "[e]nterprise [] respond[ed] as new threats to the industry arose." JA3266-67.

But as the district court also recognized, because of the MSA, these organizations *no longer exist*: "TIRC/CTR, which was created in 1954, *existed until 1998*, and the Tobacco Institute, which was created in 1958, *existed through 2000*" JA3268 (emphases added). They were dissolved pursuant to the MSA. JA6967-69. The same is true of *all* the other entities that the district court pointed to as support for its "enterprise" ruling. CIAR was disbanded in 1999 pursuant to the MSA. JA6967. The so-called "Committee of Counsel," the College of Tobacco Knowledge, the Research Liaison Committee, and the ETS Advisory Committee were all part of TI, now dissolved. JA1827, JA1884, JA1901-02, JA3268. Indeed, the College of Tobacco Knowledge has not existed since the 1980s, and the Research Liaison Committee disbanded in 1978. JA1836. The Industry Technical Committee has not existed since the 1970s. JA1887-90. It is not surprising, therefore, that neither the government nor the district court identified *any* alleged joint activity by defendants since the MSA was entered into in 1998 – let alone joint activity amounting to a formal, structured "enterprise."

---

[22] TI was an industry-funded organization engaging in public relations and lobbying. JA1799-800. CTR was an industry-funded organization that funded scientific research. JA1762.

The district court stated that these organizations and the enterprise "can be readily re-activated." JA3267, JA3335. But neither it nor the government offered any evidence for this *ipse dixit* assertion. The express terms of the MSA preclude defendants from "reconstitut[ing] CTR or its function in any form" and from participating in any tobacco-related trade associations that "act in any manner contrary to" the provisions of the MSA, including the MSA's provisions forbidding any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product." JA6970. The MSA also contains detailed procedural checks to ensure that any future tobacco-related trade association will operate independently of defendants. JA6968. Finally, the MSA expressly enjoins defendants from joint activity that in any way has the "purpose or effect" of limiting the production or distribution of information to the public about the health hazards of smoking or of limiting or suppressing research into smoking and health. JA6969-70.

The district court nonetheless found that defendants might have unspecified "temptations" and "opportunities" to re-form the defunct alleged enterprise.[23] JA3267. But nowhere did the court explain *how* it is reasonably likely that defendants could reform the enterprise in the face of the MSA's prohibitions.

---

[23] The only specific "example" offered by the district court of these supposed "opportunities" is that "Philip Morris currently has PMERP (Philip Morris External Research Program)." However, the PMERP, as its name conveys, is administered by PMUSA and no other defendant. JA3267, JA3335.

b. The MSA Prohibits Defendants From Committing Predicate Acts

The MSA also imposes scores of injunctions and related prohibitions that bar any continuation or repetition of the core wrongdoing alleged by the government and found by the district court. For example, the MSA:

- Enjoins material misrepresentations of fact regarding the health consequences of smoking, JA6970;
- Enjoins targeting youth in the advertising, promotion, or marketing of tobacco products, JA6955;
- Bans the use of cartoon characters in the advertising, promotion, packaging, or labeling of tobacco products, JA6955;
- Bans billboards and virtually all other outdoor advertising of tobacco products, JA6958-59;
- Bans apparel or other merchandise bearing a tobacco brand name (*e.g.*, caps, jackets or bags with a tobacco brand name), JA6961; and
- Sharply restricts tobacco brand-name sponsorships of events or teams both in number and in type, with a flat ban on sponsorship of athletic events in the major sports, JA6956-58.[24]

---

[24] Notably, the MSA did not ban the use of any low tar descriptors, such as "lights." As discussed below, because the FTC

As even the district court acknowledged, "the MSA has made significant strides towards preventing Defendants' [allegedly] fraudulent activities." JA3342.

Yet, the district court offered no explanation of how the "fraudulent sub-schemes" could possibly continue into the future consistent with the MSA. For example:

- The court found that defendants misrepresented the health effects of smoking and made false statements about addiction, nicotine manipulation, and low tar products. JA3233-35. But the MSA enjoins the signatories from making misrepresentations regarding the health consequences of using any tobacco product, including statements with regard to tobacco additives, filters, paper or other ingredients. JA6970.
- The court found that defendants agreed to suppress research into smoking and health. JA3233-35. But the MSA enjoins the signatories from agreeing to limit or suppress research into smoking and health. JA6969-70.
- The court found that defendants marketed to youth, JA3233-35, and designed advertisements that "appeal to and target youth," JA3252. But the MSA prohibits the signatories from taking any action, directly or indirectly, to target youth in the advertising, promotion, or marketing of tobacco products, or taking any action, the primary purpose of

---

[Footnote continued from previous page]

has authorized the use of such descriptors, they cannot form the basis of a RICO violation. *See infra* at V.

which is to initiate, maintain, or increase the incidence of youth smoking. JA6955-56.

The district court nonetheless disregarded the MSA because it doubted the States' ability to enforce these injunctions. JA3343. But the "facts" relied upon by the court relating to the States' ability or willingness to enforce the MSA are nowhere to be found – either in the opinion or in the record. For example, the district court cited nothing for its repeated assertions that the States have devoted "limited resources" to MSA enforcement. JA3221, JA3225. This assertion is belied by the court's own finding that that the States have instituted numerous enforcement measures against defendants. JA3342-43.

The district court also asserted that "Defendants have not fully complied with the letter or spirit of the MSA." JA3342. But leaving aside that the court failed to cite even a single violation of the MSA that was not dealt with by the States, failure to comply with all the details or the "spirit" of the MSA does not even begin to approach a *RICO* violation. Indeed, the six examples cited by the court as violations of the "letter or spirit" of the MSA confirm beyond doubt that the States *are* vigorously enforcing it. Of the six:

- One example simply noted that Lorillard had not changed its "Pleasure" advertising campaign. JA3342. But the MSA did not require it to do so. Nor does this advertising violate RICO.
- Another noted that PMUSA and Altria's international subsidiary each sponsor motor sports teams when the MSA limits each signatory to one sports sponsorship. But the

court never states that this violates the MSA, because it plainly does not. JA3343. And the court does not even begin to explain how sponsorship of a motor sports team by an Altria subsidiary violates RICO.

- One charged that "[e]ven though the MSA required defendants to shut down and disband CIAR, Philip Morris has reconstituted it at the same address and with the same director, under the name of the Philip Morris External Research Program." JA3343. But nothing in the MSA barred PMUSA *individually* from operating a research program and, indeed, PMUSA would be criticized if it were *not* undertaking research. Nor does such individual activity in any way suggest that PMUSA will engage in RICO violations.
- A fourth accused defendants of "increas[ing] price promotions" – *i.e.*, reducing prices – noting that "youth are particularly vulnerable to" price reductions. *Id.* But it is absurd to charge that defendants' competitive price reductions violated RICO (or even the MSA or its "spirit") merely because youth – like all rational consumers – prefer lower prices.

This leaves just two other purported instances of failure to "compl[y] with the letter or spirit of the MSA." JA3342. As the district court itself acknowledges, in one, the State brought an enforcement action to end the conduct, *see People ex rel. v. Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317 (Cal. Ct. App. 2004) (alleged youth targeting), and, in the other, PMUSA voluntarily ended the conduct after a State Attorney General protested. JA3342-43 (limiting sponsorship of a single motor sports team to only

one auto racing league per year). In other words, in the only instances arguably worthy of the States' attention, the States did, in fact, successfully protest the conduct at issue.[25] Indeed, the fact that the court was able to point to only two such instances in the eight years of the MSA's enforcement – each of which was resolved to the satisfaction of the States – establishes the efficacy of the MSA.[26] These instances, moreover, were actions by individual companies, not any "enterprise" governed by RICO.

In short, far from demonstrating that the MSA is ineffective, the evidence relied upon by the district court confirms that the government failed to discharge its burden of showing a likelihood of future RICO violations in the face of the MSA.

---

[25] The court also asserted that "[t]he states' Attorneys General have complained to Philip Morris that more than forty types of activities violate the MSA." JA3222. But the testimony relied on by the court was not testimony at all, but a cross-examination *question*. The actual testimony simply points out informal inquiries made by the Attorneys General – each of which was resolved to the States' satisfaction. *See* JA7334-36.

[26] The court also held that the MSA could not prevent future violations, because defendants Altria (a holding company that owns PMUSA and other companies) and BATCo were not subject to the provisions of the MSA. JA3345. However, Altria does not manufacture, sell, market, or advertise cigarettes, *see, e.g.*, JA9145-46; JA1201; and BATCo does not manufacture, sell, market, or advertise cigarettes in the United States, *see, e.g.*, JA9120; JA8445; JA3346 n.47. Moreover, the MSA's elimination of any potential "enterprise" structure makes RICO violations by *any* defendant unlikely, regardless of whether that defendant is a party to the MSA.

2. Defendants' Current Public Positions Preclude Future RICO Violations

Apart from the MSA, defendants years ago radically transformed their business practices and public positions on issues relating to smoking and health. Defendants' revised public positions with respect to causation, addiction, and low tar simply cannot be undone.[27]

a. Defendants Have Admitted For Years That Smoking Causes Lung Cancer

The principal fraud found by the district court was defendants' denial of a causal link between smoking and disease. JA3234. However, as the government's experts conceded, defendants have publicly admitted for years that smoking causes disease. *See, e.g.*, JA9073 (by 1999, defendants had made "direct and explicit admission[s] that cigarette[] smoking caused disease"). PMUSA states on its website that it "agrees with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers." JA7940. RJR states that "smoking, in combination with other factors, causes diseases in some individuals." JA9254. Lorillard has likewise "stated publicly that we agree with and accept the Surgeon General's and other public health authorities' views, which includes any disease," JA9070, and its website encourages the public to rely

---

[27] With respect to the remaining alleged schemes (ETS, nicotine manipulation, youth marketing, and suppression), the district court erred in finding any RICO violation, as discussed *infra* at VI, VII, and VIII.

on public health authorities for information about the hazards of smoking. JA1021-23.

The district court nonetheless concluded that defendants were likely to revert to past denials of adverse health effects because defendants' concessions were "half-hearted," faulting RJR for stating that smoking causes disease "in combination with other factors," and Lorillard for similarly stating that smoking is a "risk factor" for disease. JA3337-38. Of course, both statements are accurate. Moreover, this semantic quibbling does not even remotely demonstrate that defendants are likely to deny in the future that smoking causes disease. In any event, it is impossible to understand how defendants could reverse positions on this issue in a way that would be fraudulent, because no rational consumer would believe them (particularly after four decades of mandated health warnings). *See infra* at VI (statement must be material to be fraudulent).

b. Defendants Have Admitted For Years That Smoking Is Addictive

The same is true of the district court's finding that defendants are reasonably likely to deny that smoking is "addictive." Although defendants dispute the court's conclusion that defendants' past statements were fraudulent, *see infra* at VIII, all defendants now agree that smoking is addictive.

PMUSA, for example, has publicly admitted the addictiveness of smoking for years:

> Philip Morris USA agrees with the overwhelming medical and scientific consensus that cigarette smoking is addictive. It can be very difficult to quit smoking, but this should

> not deter smokers who want to quit from trying to do so.

JA7940. Other defendants have done the same. JA2188-89 (RJR acknowledged that "'[m]any people believe that smoking is addictive, and as that term is commonly used today, it is'"); JA2193-94 (BWTC posted a document on its website that stated, "'by some definitions, including that of the Surgeon General in 1988, cigarette smoking would be classified as addictive'"). And, although the court criticized the content of a 2003 press release regarding a litigation verdict that Lorillard posted on its website, JA3338 (stating that "willpower is the only smoking cessation aid that always works"), the fact of the matter is that, since May 2000, Lorillard has also agreed that cigarette smoking is addictive. JA1027.

The district court acknowledged these statements, but criticized defendants for not "publicly inform[ing] consumers that *nicotine* is addictive, much less that smoking is a *nicotine-driven* addiction." JA3340 (emphases added). But the important thing for smokers to know is that *smoking* is addictive. Certainly, this "omission" does not constitute *fraud*, much less a RICO violation. JA3351.[28]

---

[28] Denise Keane, the General Counsel of PMUSA, did *not* testify – as the court reported – that "it is material for people to know that Philip Morris agrees that the nicotine delivered in cigarette smoke is addictive." JA3340. Instead, she testified only that "the fact that *smoking* is addictive" is material to consumers. JA9132 (emphasis added).

c. Defendants Have Disclosed To Consumers That Low Tar Cigarettes May Not Be Safer

The district court also found that defendants' statements about low tar cigarettes were fraudulent because defendants did not inform low tar cigarette smokers that they may "compensate" – *i.e.*, change the way that they smoke in order to obtain more nicotine – and thus may get the same amount of tar and nicotine from low tar cigarettes as they would from a higher tar cigarette. JA2597- 610, JA3247-49. Again, defendants vigorously dispute that they have ever misled consumers on this issue (*see infra* at V), but, in any event, the record is clear that defendants today provide consumers with precisely the information that the court found previously lacking. *See* JA2648-49, JA2662-63.

For example, in a November 2002 package "onsert" (a brochure enclosed in the cellophane wrapping) that PMUSA included with approximately 130 million packages of non-full flavor (light, ultralight, low tar, and medium tar) cigarettes, PMUSA told consumers that "the tar and nicotine yield numbers are not meant to communicate the amount of tar or nicotine actually inhaled by any smoker, as individuals do not smoke like the machine used in the government test method." JA7848. PMUSA further advised:

> The amount of tar and nicotine you inhale will be higher than the stated tar and nicotine yield numbers if, for example, you block ventilation holes, inhale more deeply, take more puffs or smoke more cigarettes. Similarly, if you smoke brands with descriptors such as "Ultra Light," "Light," "Medium," or

> "Mild," you may not inhale less tar and nicotine than you would from other brands. It depends on how you smoke.

Id. In the fourth quarters of 2003 and 2004, PMUSA again enclosed similar onserts in more than 100 million packages of cigarettes. JA1205; JA1100-01; JA7848; JA7909; JA7941-42. PMUSA also has disclosed the onsert and additional information about low tar cigarettes and compensation on its publicly accessible website since October 1999. JA7940; JA1202-04.

Other defendants have provided similar information to consumers. RJR has informed consumers that "there is no such thing as a safe cigarette" and that the use of descriptors does not mean that a cigarette is safer. JA1196; JA9259. RJR also has publicly described compensation and communicated the findings of the National Cancer Institute's Monograph 13, to which it directed consumers via a link on its website. *See* RJ Reynolds Tobacco Company, Smoking and Health, Guiding Principles and Beliefs, http://vvww.rjrt.comismoking/summaryCover.asp. Likewise, Lorillard has advised consumers that "*all* cigarettes are dangerous" and has stated that low tar cigarettes do not present a clear reduction in risk. JA1024-26. In short, there simply is no basis for finding that defendants are engaged in current, or likely to commit future, RICO violations relating to low tar cigarettes.

3. BWH's Reconstituted Status And TI/CTR's Dissolution Preclude Future RICO Violations And Render This Case Moot As To These Entities

The district court also erred in finding that BWH is likely to commit future RICO violations because, after the amended complaint was filed, BWTC was reconstituted as a passive holding company. On July 30, 2004, the entirety of BWTC's domestic tobacco operations, assets, and liabilities were merged with Reynolds Tobacco. *See* JA9325-27; JA8311-74; JA8445. BWH owns no facilities, manufactures no tobacco or tobacco products, and engages in no advertising or selling of tobacco products at all. *See* JA8588-662. Further, it has withdrawn from all domestic and international trade organizations and no longer maintains a website. *See, e.g.*, JA9129; JA1056; JA9142-43; JA1194-95; JA9106. As a result of the merger, "the challenged conduct [has] cease[d] such that 'there is no reasonable expectation that the wrong will be repeated,' [and thus] it becomes impossible for the court to grant 'any effectual relief whatever' to [the] prevailing party." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000).

In reaching the conclusion that the prescribed remedies were necessary to prevent and restrain future RICO violations, the district court failed to make any findings, nor was any evidence presented, that the post-merger BWH, as reconstituted, manufactures, sells, or markets tobacco products. Such a finding, supported by evidence, is a prerequisite to establishing a reasonable likelihood of future RICO violations. Accordingly, BWH's fundamental reconstitution and corresponding complete withdrawal from any tobacco operations – combined with the

court's failure to make *any findings* to the contrary – compels the conclusion that there is no reasonable likelihood that BWH will commit any future violations of RICO.

This reconstituted status also renders the government's case against BWH moot – depriving the district court of Article III jurisdiction. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472,477-78 (1990); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189-91 (2000); *Deakens v. Monaghan*, 484 U.S. 193, 199 (1988); *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 47 (D.C. Cir. 1999). Where, as here, a defendant is a reconstituted entity that has completely withdrawn from, and shows absolutely no propensity to return to, the challenged conduct, a court lacks subject-matter jurisdiction to enjoin that defendant. *County of Los Angeles v. Davis*, 440 U.S. 625, 632-34 (1979).

These principles also require reversal as to CTR and TI. The district court recognized that no relief could be awarded against these entities because there was no likelihood that they would violate RICO in the future. JA3347-52. More fundamentally, however, because CTR and TI no longer exist, the entire case against these entities should be dismissed as moot.

* * *

PART TWO: ERRORS WITH RESPECT TO SPECIFIC SCHEMES

The district court committed numerous errors with respect to its conclusion that defendants engaged in fraudulent activity. *First*, any conclusion that defendants committed fraud by marketing and selling light and low tar cigarettes cannot stand be-

cause, among other reasons, that very conduct was approved by the FTC. *Second*, with respect to the remaining schemes, there was no evidence that defendants' statements were material or intended to deprive persons of money or property, as the mail and wire fraud statutes require. *Third*, with respect to the alleged ETS scheme, the court erred in finding that good faith and scientifically supported statements about the health effects of ETS amounted to criminal fraud. *Fourth*, with respect to the alleged addiction scheme, the court likewise erred in converting a semantic debate over whether cigarettes are better described as "addictive" or "dependence-producing" into criminal fraud. *Finally*, even if the fraud statutes themselves did not foreclose the court's conclusions, the First Amendment would.

V. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING FRAUD RELATING TO LOW TAR CIGARETTES

The district court committed legal error with respect to the specific alleged "scheme" of fraud relating to defendants' use of descriptors such as "low tar," "light," or "ultra light" to refer to reduced-yield cigarettes (as measured by the FTC Method) compared to full-flavor cigarettes. As the Fifth Circuit recently held, "the use of FTC-approved descriptors cannot constitute fraud" because "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement." *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th Cir. 2007). The district court's judgment with respect to low tar cigarettes is thus legally erroneous because it (1) improperly uses a general statutory standard to override the FTC's specific authorization of the descriptors as part of an integrated

regulatory program, (2) ignores the well-established principle that government-approved conduct cannot be the target of government prosecution, (3) improperly finds the descriptors fraudulent, (4) violates the First Amendment, and (5) applies to the sale of cigarettes wholly outside of the United States.

* * *

D. The Descriptors Were Not Fraudulent

The district court's judgment with respect to the alleged low tar scheme must also be reversed because the descriptors were not "fraudulent" as a matter of law. Under the mail and wire fraud statutes, the government "bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct." *United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994). In other words, the government must affirmatively disprove "any reasonable interpretation of an ambiguous statement" under which it would not be fraudulent. *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980); *see also United States v. Diogo*, 320 F.2d 898, 905-07 (2d Cir. 1963) ("it is incumbent upon the Government to negative any reasonable interpretation that would make the defendant's statement factually correct"). In *United States v. Dale*, 991 F.2d 819 (D.C. Cir. 1993), this Court cited these cases favorably and found a violation of 18 U.S.C. § 1001 only "because [defendant's] statements were not literally true under a reasonable interpretation of the [statements]." *Id.* at 832-33 & n.22.

Here, the government did not even attempt to satisfy this standard (nor could it). Indeed, the descriptors are *literally true* – "[t]here is . . . no dispute

that the allegedly misleading terms ['light' and 'lowered in nicotine and tar'] accurately describe the results of the FTC testing method." *Clinton*, 498 F. Supp. 2d at 652. Notably, the government did not, and could not, even allege that defendants ever expressly stated that light cigarettes are safer – at most, the allegation was that the use of the descriptors "*implied* a health benefit." JA2611 (emphasis added).

Moreover, under the government's theory, light cigarettes are as unhealthy as regular cigarettes only when smoked in a manner or in numbers sufficient to produce "complete compensation." *See, e.g.*, JA2488 ("*Because compensation is essentially complete*, low tar cigarette smokers inhale essentially the same amount of nicotine and tar as they would from full flavor cigarettes, thereby eliminating any purported health benefit from low tar cigarettes."); *see also* JA2488-89. This is because, as the government acknowledged and the district court found, there is a "dose-response" relationship between smoking and disease; the less tar and nicotine to which smokers are exposed, the lower the associated lung cancer risk. JA2486; JA9080; JA1143.

Consequently, the descriptors can be deemed "false" only if one interprets those literally true statements as implying that light cigarettes are *always* healthier, even for smokers who compensate completely (by, for instance, smoking more cigarettes). But defendants never said anything remotely like that, and there is not a scintilla of evidence that consumers understood the descriptors to imply that light cigarettes would always be safer, regardless of how the cigarettes are smoked or how many cigarettes are smoked. Far from the only "reasonable" interpretation, such an interpretation would

not be "reasonable" at all; it would defy common sense.

Beverage companies would not be making an implicitly false statement – or deceiving consumers – if the companies described their products as "low cal" or "low caffeine" even if consumers generally increased their consumption to "compensate" for lower levels of the sugar and caffeine they crave. The same is true here. For example, if an individual compensates by smoking more light cigarettes, such an individual cannot reasonably expect to obtain the same benefits that he or she would have otherwise obtained by not smoking more. In short, the government has ascribed to a literally true statement a meaning that is completely counter-intuitive and unsupported by the evidence – and thus has not come close to negating "any reasonable interpretation that would make the defendant's statement factually correct."[35] Indeed, the descriptors can hardly be deemed unequivocally false when the Fifth Circuit recently declared that they "cannot constitute fraud." *Brown*, 479 F.3d at 392.

* * *

---

35 Even under the less onerous provisions of the civil FTC Act, where, as here, the challenged statements are "literally true," there must be "evidence of substance," usually consumer survey evidence, about what "the person to whom the advertisement is addressed find[s] to be the message." *Brown & Williamson*, 778 F.2d at 40 (internal quotation marks omitted). Here, there is no evidence that anyone interpreted descriptors to convey the message that light cigarettes will always be safer even if they are smoked in a way that produces the same amount of tar and nicotine as full flavor cigarettes.

VI. THE DISTRICT COURT ERRED BECAUSE THE ALLEGED FRAUDULENT STATEMENTS WERE NEITHER MATERIAL NOR INTENDED TO DEPRIVE ANYONE OF MONEY OR PROPERTY

The district court also committed reversible error with respect to the alleged schemes other than low tar (which fails for the reasons stated in Section V) because it failed to apply two essential prerequisites to any violation of the fraud statutes: that the defendant must have intended to deprive someone of "money or property" and that the alleged fraudulent statement must have been "material."

To show a violation of the mail and wire fraud statutes, the government had to prove that defendants' statements were designed fraudulently to deprive tobacco consumers of their money. *See McNally v. United States*, 483 U.S. 350, 360 (1987). Even knowingly false statements (and these were not) designed to mislead the government or to deceive the public to secure support for forestalling anti-tobacco regulation are not actionable under the mail and wire fraud statutes. *See Cleveland v. United States*, 531 U.S. 12, 19 (2000); *see also Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249 (7th Cir. 1989).

Moreover, a fraudulent statement not only must be made with the intent to deceive, but must be "material" – *i.e.*, "of importance to a reasonable person in making a decision about a particular matter or transaction." *United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996); *see also Neder v. United States*, 527 U.S. 1, 25. The reasonable person for these purposes is presumed to be a person of "ordi-

nary prudence and comprehension." *Corley v. Rosewood Care Center, Inc. of Peoria*, 388 F.3d 990, 1009 (7th Cir. 2004).

The district court did not address materiality in connection with any specific scheme (other than low tar cigarettes, discussed *supra* at V), or with respect to any of the alleged predicate acts, but made two general observations about it. *First*, the court said that the question of materiality "answers itself" because defendants annually spent "millions upon millions of dollars in advertising." JA3318. But, the *product* advertising that defendants spent millions on is not the source of the alleged misrepresentations. Rather, the alleged public falsehoods were largely contained in representations to government agencies or the general public that focused on issues such as ETS or addiction. Moreover, a large majority (about 79%) of the statements cited in the district court's opinion were *internal* communications, which were never made available to the public and thus could not have been intended or likely to defraud consumers. *See infra* at 110 n.43.[38]

Second, the district court assumed materiality based on the unsupported and counter-intuitive contention that, "for much of the period," defendants, rather than the "public health community," were "the primary source of information regarding cigarette smoking and tobacco addiction" and it was therefore "reasonable . . . for consumers to believe that the Defendants' statements accurately reflected the current

---

[38] Approximately 751 of the 822 documents the district court cited on addiction (91%) were internal communications, JA2065 247, as were 522 of the 610 (86%) ETS documents, JA2943-3140.

knowledge about the dangers of smoking." JA3317. The court's only support for this assertion is the part of its opinion describing the public health community's struggle to determine the essentially semantic issue of whether smoking should be described as an "addiction" prior to 1988. *See* JA2069-79, JA3317. But if consumers relied on tobacco companies' view of addiction during the "period" *prior* to 1988, there would be no fraudulent misrepresentation because, according to the court, those pre-1988 statements comported with the views of the public health community and only became fraudulent in that year. *See infra* at 105. And, after 1988, when the Surgeon General and public health community repeatedly told the public that smoking is addictive, there is no evidence or finding to support the implausible notion that consumers would look to the financially motivated views of defendants, rather than the "consensus" of the public health community.

Finally, the complete absence of evidence that any consumer anywhere actually took defendants' statements into account in deciding whether to purchase cigarettes wholly belies the notion that a "reasonable person" would think these statements important. Even though the government need not prove actual reliance to establish a violation of the fraud statutes since they reach "*schemes* to defraud," not just completed frauds, the absence of evidence of actual consumers' views here is virtually dispositive, particularly given that the alleged fraud occurred over decades during which millions of cigarette purchasers received mandated health warnings.

A more detailed review of the specific fraudulent "misrepresentations" further reveals the deficiencies in the district court's analysis.

A. Youth Marketing

The government alleged – and the district court found – that defendants committed fraud *not* by targeting youth with cigarette advertising (which is not a RICO violation), but rather by *denying* that they targeted youth with their advertising. But defendants' statements denying youth marketing cannot constitute indictable mail or wire fraud crimes because they were neither material nor intended to deprive smokers of money or property.

First, the district court never found that defendants' statements denying youth marketing were *material*. This omission is hardly surprising. Neither logic nor evidence supports the bizarre notion that any person, young or old, would have stopped or refrained from smoking if defendants "admitted" that they marketed to youth. *See In re Tobacco Cases II*, 20 Cal. Rptr. 3d 693, 714 n.21 (Cal. Ct. App. 2004) (dismissing similar claims of fraud in denying youth marketing on materiality grounds; it was "implausible that" such statements "factored into [plaintiffs'] decision to smoke"), *aff'd*, 41 Cal. 4th 1257 (Cal. 2007).

Second, there is no evidence or finding that defendants' denials were intended to deprive consumers of money or property. Indeed, the district court found, and the government's own witness conceded, that defendants' statements were motivated by a desire to "avoid regulation by the FTC." JA2907; JA9118-19.

B. Nicotine Manipulation

Defendants' denials concerning nicotine manipulation were not "material" to a reasonable consumer's purchasing decisions for the simple reason that there is no evidence that tobacco consumption would be

different if defendants (contrary to the evidence and their own beliefs) admitted that they deliberately increased or manipulated the levels of nicotine.

In any event, the denials were true. Defendants, when denying nicotine manipulation, were denying allegations that they *spiked or increased* nicotine levels. JA2372, JA2379-80, JA2382-85. The district court, however, found defendants' denials false only by defining "nicotine manipulation" so broadly as to include design changes that *reduced* nicotine levels. JA2300-02. But defendants never denied *reducing* nicotine levels, and the court never found to the contrary.[39]

C. The Health Effects Of Smoking

The "adverse health consequences of tobacco [are] well known." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 138. Indeed, Congress' explicit warnings concerning these negative health effects have been prominently displayed on every cigarette package since January 1, 1966. Thus, "[n]o jury could find that a reasonable [person] would be misled by [a] statement . . . when the truth was under his nose in black and white (many times over)." *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 570 (7th Cir. 1991); *see also, e.g., Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819

---

[39] Moreover, defendants were correct in denying that the use of ammonia during their manufacturing processes raises the pH level of nicotine or its rate of absorption into the blood. The government's experts uniformly testified that there was insufficient evidence to conclude that defendants' use of ammonia caused an increase in the pH level of nicotine or had any effect on the rate of nicotine absorption into the bloodstream or brain. JA9113-15; JA9085; JA9116; JA9086- 88; JA9067.

F.2d 151, 153 (6th Cir. 1987); *United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996).

Here, the district court found only that, "in the early days," smokers "did not want to believe . . . that smoking was disastrous for their health." JA3317-19. Of course, many courts have dated common knowledge of the health risks and addictiveness of smoking to the 1950s or even earlier. *See, e.g., Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1221 (W.D. Wis. 2000); *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 433 (D. Md. 2000). Certainly, by the mid-1970s, the public was aware of smoking's adverse health consequences and thus any inconsistent assertion by defendants could not be material to a reasonable person. JA6332.[40] At a minimum, smoking's adverse health consequences have been universally recognized for at least the last ten years, and defendants have not denied those consequences during that same time period. There is, therefore, no basis for prospective relief. *See supra* at 53-54.

D. ETS, Addiction, And Suppression

Finally, the government did not establish, nor did the district court find, that defendants' statements about the health effects of ETS and addiction, or their alleged suppression of research, were material or intended to deprive consumers of money. As to ETS, only one act was charged (RA 42). JA3419. It concerns a 1977 statement and is not even mentioned in the district court's findings or conclusions regarding ETS. The evidence concerning statements not charged as predicate acts suggests at most that

---

[40] *See also* JA9055; JA4759; JA5385; JA6316-17; JA4092-93.

defendants' statements were designed to ward off government regulation, such as prohibiting smoking in restaurants, not to induce individuals to purchase cigarettes. The same is true regarding the alleged suppression of documents. *See* JA3140-41 (suppression to "protect their public positions . . . avoid or limit liability . . . in litigation, and prevent regulatory limitations"). As to addiction, there is simply no basis to conclude that the semantic debate over whether cigarette smoking causes "addiction" or "dependence," *see infra* at 105, would be material to a reasonable person since both clearly convey the same important information to consumers – that smoking can be difficult to quit.

VII. THE DISTRICT COURT ERRED IN FINDING FRAUD RELATING TO ENVIRONMENTAL TOBACCO SMOKE

The district court concluded that, when defendants asserted that the available scientific evidence has not established that ETS causes disease, they violated criminal fraud statutes because this view was contrary to a scientific "consensus" that developed in 1986. *See, e.g.*, JA3258-59.

However, good faith is a complete defense to allegations of mail fraud. *United States v. Young*, 470 U.S. at 31-32. Relatedly, a "statement of opinion cannot constitute fraud, except in unusual circumstances." *de Magno v. United States*, 636 F.2d 714, 720 n.9 (D.C. Cir. 1980); *see also United States v. Amlani*, 111 F.3d 705, 717-18 (9th Cir. 1997) (misrepresentation cannot be based on expression of opinion); *Migliaccio*, 34 F.3d at 1524 ("inaccurate, incorrect or wrong" opinions not actionable).

These principles apply with particular force with respect to an ongoing scientific debate about the

health effects of products. Courts have repeatedly ruled that "taking one side of a medical or scientific dispute is [not] 'fraud.'" *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999); *Singer v. Am. Psychological Ass'n*, 1993 WL 307782, at *11 (S.D.N.Y. Aug. 9, 1993) (when parties are "engaged in heated debate as to the scientific validity of [a] theory . . . [expressing] their views to others over the telephone and through the mails . . . does not transform those acts into fraud constituting a RICO conspiracy"); *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 506 (D. Minn. 1984) ("taking a particular view in a scientific debate" is protected by the First Amendment).

Thus, a defendant's views on a complex scientific debate about its products will rarely, if ever, be deemed "false," at least unless it is clear that the defendant did not subjectively believe the assertion or that it is entirely devoid of legitimate support. *See Ollman v. Evans*, 750 F.2d 970, 975-76 (D.C. Cir. 1984) (en banc) ("There is no such thing as a 'false' opinion."). Any other rule would severely restrict valuable contributions to the marketplace of ideas by criminalizing any input from commercial entities that runs counter to the majority or "consensus" view. Such a result is foreclosed by both the rule of lenity, *supra* at 27-28, and, given the obvious First Amendment implications, the doctrine of constitutional doubt. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998).

Here, there was a legitimate basis for defendants' views that the link between ETS and disease had not been definitively established.

1. As an initial matter, it is undisputed that, before 1986, defendants' statements were not contrary

to any "consensus," even under the district court's view of the facts. Before 1986, the Surgeon General, whose reports the court found to "represent the scientific consensus on smoking and health topics," JA2965, had not concluded that ETS exposure causes disease. JA2948-63, JA3139. Indeed, in late 1984, one of the government's ETS experts found that there was a "paucity of data" linking ETS to lung cancer in non-smokers that "contrast[ed] sharply with the literature cited in the 1964 Surgeon General's Report which characterized active cigarette smoking as a cause of lung cancer." JA5585. In January 1986, Surgeon General Koop wrote that "the . . . statement that the 'currently available data do not support a conclusion that exposure to [ETS] represents a health hazard' is supportable, given the existing evidence." JA5650. Thus, according to the court's own findings, defendants' pre-1986 statements accurately reflected the state of the scientific evidence at the time.

Nor was there any basis for concluding that any defendant uniquely possessed relevant scientific evidence that was unavailable to the scientific community. Although the district court referred to defendants' supposed "internal acknowledgment of the hazards of secondhand smoke," JA3256, the only type of "acknowledgment" identified was that ETS contains substances that could be carcinogenic or toxic and that a few published studies had found a weak statistical correlation between spousal smoking and lung cancer. JA2972-91. The Surgeon General and public health scientists were well aware of these facts, *see, e.g.*, JA2948-63, but also had not concluded that ETS exposure causes disease. JA3139.

2. The district court also had no grounds to conclude that defendants' post-1986 ETS statements ei-

ther lacked a legitimate basis or did not reflect the true beliefs of the persons who made the statements. Indeed, in *1998*, a federal district court found that the EPA, using methodologies similar to that employed by the Surgeon General and government experts here, did not have "sufficient evidence to conclude ETS causes cancer in humans" because there was a "significant number of studies and data which demonstrated no association between ETS and cancer" and because the "EPA did not demonstrate a statistically significant association between ETS and lung cancer." *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 438, 463 (M.D.N.C. 1998), *vacated on other grounds*, 313 F.3d 852 (4th Cir. 2002). Standing alone, this 1998 finding by a federal court demonstrates that defendants' expression of similar opinions was not fraud.

Moreover, notwithstanding the alleged "consensus," independent scientists shared defendants' judgment about ETS and disease causation after 1986. JA9057, JA9059. For example, scientists continued to question the Surgeon General's conclusion because of the "limits of its methodology," "substantial gaps in the available data," and "substantial differences in opinion on how to interpret the data." *See* JA6807-18; JA7405-53; JA7242 (recognizing that there "are still uncertainties associated with the assessment of ETS"). Likewise, in 2003, the editor of the *British Medical Journal* stated that "[w]e must be interested in whether passive smoking kills, and the question has not been definitively answered. It's a hard question, and our methods are inadequate." JA7931. The district court provided no explanation of how defendants' opinions could have lacked a legitimate scientific basis in light of similar post-1986 statements by non-industry scientists.

3. Nor was there any evidence that defendants *believed* that ETS had been shown to cause serious disease in otherwise healthy adult non-smokers. All of defendants' current and former employees and consultants consistently testified that they believed that ETS had not been shown to cause chronic disease in healthy adult non-smokers. *See* JA9077; JA9075; JA1155-56; JA9149-51. The existence of two industry-sponsored studies by outside scientists finding a correlation between ETS exposure and disease, JA2990-91, does not constitute evidence of *defendants'* beliefs. At most, these studies are consistent with the conclusion that by the 1990s many outside scientists thought that ETS causation had been established – a point no one denies. They do not suggest that the minority view is "false," much less that it was not believed by defendants or devoid of a legitimate basis.

VIII. THE DISTRICT COURT ERRED IN FINDING FRAUD RELATING TO ADDICTION

The district court's ruling regarding "addiction" transforms a semantic debate into a criminal fraud case. Unquestionably, smoking is difficult to quit. The question here, however, is which label to affix to this difficulty – "addiction" or "dependence." Defendants did not commit a RICO violation by arguing against the use of the word "addiction."

Fraud requires a misstatement of fact. A "fact" is something that is "objectively capable of proof or disproof." *Ollman*, 750 F.2d at 982. A statement is factually "false," therefore, only if it avers or clearly implies an event or characteristic that is disproved through objective evidence. *Id.* at 981. Thus, statements concerning or using "indefinite terms," *id.*,

almost inherently cannot be "false" because, by definition, they are vague and imprecise. *See id.* at 979-80. More specifically, as noted, a "facial[ly] ambigu[ous]" term cannot be fraudulent unless the government affirmatively disproves "*any reasonable interpretation* of [the] ambiguous statement" under which it would not be fraudulent. *United States v. Anderson*, 879 F.2d 369, 376 (8th Cir. 1989) (emphasis added); *supra* at V(D).

Here, as the district court acknowledged, "[t]he scientific and medical community has struggled with the choice of the proper nomenclature to describe the human affinity for nicotine and has moved from 'habituation' to 'dependence' to 'addiction.'" JA2082-83. In 1964, the Surgeon General, applying accepted scientific definitions, determined that smoking was *not* addictive, but was a habit. JA2071. It was not until 1988 that the Surgeon General said that smoking was "addictive" – indeed, that smoking met "the same criteria for addiction that apply to heroin, morphine, and cocaine" – and, even then, he was able to do so only by significantly *redefining* the criteria for determining addiction. JA2074-75 (new criteria used in 1988); JA2076-77 (intoxication, withdrawal, tolerance eliminated); *see also* JA9083 (describing same). Government experts involved in the decision to change the definition conceded that the label "addictive" was "pejorative," a "loaded term," and had "antisocial connotations." JA9082; JA5775.

More importantly, an ambiguous term cannot cause *consumer* deception unless it is actually contrary to *consumers'* understanding of that term – regardless of the technical definition given by the scientific community. As the government's expert wrote in connection with the 1988 Surgeon General's report, "highly technical terms" are not always accu-

rately communicated to, or interpreted by, the "public." JA5760. And here there is no evidence that the *public*'s understanding of the term "addiction" would be the same as the Surgeon General or would encompass cigarette smoking – *i.e.*, that the public would call a dependent smoker a "drug addict." Indeed, that the Surgeon General *altered* the definition of addiction in 1988 to encompass tobacco products confirms that the term is inherently ambiguous and its application to cigarettes was novel and controversial. *See* JA9110, JA9112.

Thus, the government did not prove through clear and convincing evidence that defendants committed criminal fraud at the time they took issue with the characterization of cigarettes as "addictive."

* * *

APPENDIX C

[ARGUED OCTOBER 14, 2008]

Case Nos. 06-5267, 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103
(Consolidated)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee and Cross-Appellant,
and
TOBACCO-FREE KIDS ACTION FUND, et al.,
Intervenors,
v.
PHILIP MORRIS USA INC. (f/k/a Philip Morris, Inc.), et al.,
Defendants-Appellants and Cross-Appellees.

Appeal From The Judgment Of The United States District Court For The District Of Columbia

---

PETITION FOR REHEARING OR REHEARING EN BANC OF DEFENDANT-APPELLANT PHILIP MORRIS USA INC.

---

* * *

II. THE PANEL'S REFUSAL TO UNDERTAKE AN INDEPENDENT REVIEW OF THE DISTRICT COURT'S FACTUAL FINDINGS EXACERBATES AN EXISTING INTRACIRCUIT CONFLICT AND DISREGARDS FIRST AMENDMENT RIGHTS.

"[I]n cases raising First Amendment issues," an "appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp.*, 466 U.S. at 499 (internal quotation marks omitted). The Panel failed to perform this constitutionally mandated "independent examination"—even though Defendants have argued throughout this case that the First Amendment forecloses the Government's fraud allegations. By applying the "highly deferential" clearly erroneous standard of review (slip op. 45), the Panel compounded an existing conflict in this Court's precedent—as well as an existing conflict among the circuits—disregarded important First Amendment rights, and upheld findings that could not have survived independent appellate review.

The Panel applied this "highly deferential" standard of review even though the great majority of the findings at issue pertain to statements that Defendants made as part of the public-health debate about smoking, including many statements made before legislative or regulatory bodies. These statements fall squarely within the First Amendment's Speech and Petition Clauses, which provide constitutional protection for "debate on public issues" (*N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) and efforts to influence governmental policy. *Roth v. United States*, 354 U.S. 476, 484 (1957). Indeed, it goes without saying that the "First Amendment bars the state from imposing upon its citizens an authoritative vision of truth." *Herbert v. Lando*, 441 U.S. 153, 184-85 (1979). Yet, the district court concluded (and the Panel affirmed) that Defendants' public statements that directly addressed the "scientific consensus" were knowingly "fraudulent." The public-health community's adoption of an "official," orthodox position on the health risks of smoking did not, however, extinguish Defendants' constitutional right to argue a contrary point of view to the public.[6]

---

[6] Defendants' public statements about smoking and health were also protected under the *Noerr-Pennington* doctrine. The Panel's conclusion (at 40) that *Noerr-Pennington* "does not protect deliberately false or misleading statements" conflicts with the decisions of four other circuits. *See, e.g., Davric Me. Corp. v. Rancourt*, 216 F.3d 143, 147 (1st Cir. 2000); *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 160 (3d Cir. 1999); *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("[m]isrepresentations [are] condoned in the political arena"). Moreover, absent the deferentially reviewed fraud findings, the statements in Defendants' product advertisements would have fallen within the scope of

Because the Government's novel RICO theory rested on allegedly fraudulent statements that Defendants made as part of a public-health debate, the First Amendment and *Bose* self-evidently require independent review of the district court's findings. Indeed, even setting aside the existing conflicts regarding independent review in *false advertising* cases, independent review is unquestionably required of the findings that pertain to statements that Defendants made as part of the public-health debate on smoking, a public-policy matter that rests "[a]t the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982).

A. Where the First Amendment is implicated, appellate courts are "not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *Bose*, 466 U.S. at 50910 (internal quotation marks omitted). This independent appellate review is constitutionally required because the "stakes . . . are too great in cases implicating the freedom of speech to entrust determinations of falsity . . . finally to the judgment of the trier of fact." *Lebron*, 749 F.2d at 897 n.9 (internal quotation marks omitted; first alteration in original). And the "stakes" are even "great[er]" where, as here, the findings at issue are also the predicate for enjoining protected speech in the future.

The Supreme Court has repeatedly applied this requirement of independent appellate review where the question whether a defendant's speech was false

---

[Footnote continued from previous page]

the First Amendment's protections for commercial speech. *See In re R.M.J.*, 455 U.S. 191, 203 (1982).

or misleading was determinative of First Amendment protection. In *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990), the Court undertook de novo review of the Illinois Supreme Court's finding that it was misleading for an attorney to state that he was a certified civil trial specialist. *Id.* at 108 (plurality op. of Stevens, J.); *id.* at 111-12 (Marshall, J., concurring in the judgment). Similarly, in *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), the Court reviewed without deference a state agency's finding that an attorney had engaged in misleading advertising by identifying herself as a certified public accountant and financial planner. *Id.* at 14349; *see also Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 621 (2003).

Although *Bose* would seem to settle the issue, even prior to the Panel's decision, this Court had reached conflicting conclusions about whether *Bose* and its progeny require independent appellate review in deceptive advertising cases. In *Lebron*, this Court independently reviewed a district court's finding that an advertisement was deceptive. After "[c]arefully inspecting the poster for [itself]," the Court found that the advertisement in fact was not misleading. 749 F.2d at 898. Only a year later, however, the Court held—in direct conflict with *Lebron*—that "*Bose* does not change the standard of review in deceptive advertising cases" and therefore reviewed for clear error a district court's conclusion that an advertisement was deceptive. *Brown & Wil-*

liamson, 778 F.2d at 41 n.3; *see also Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000) (same).[7]

B. The Panel exacerbated these existing intracircuit and intercircuit conflicts when it declined to perform an independent examination of the district court's factual findings regarding the allegedly fraudulent nature of Defendants' speech. Slip op. 45, 48. In so doing, it extended the conflict between *Lebron* and *Brown & Williamson* beyond the deceptive advertising context to a case where the vast majority of Defendants' challenged speech represented constitutionally protected participation in a public-health debate. Whatever the applicability of *Bose* to commercial advertising, there is no question that it applies to such "core" First Amendment speech. *Brown*, 456 U.S. at 52.

If the Panel had undertaken the required de novo review, it would have been required to vacate many of the district court's most important findings. Indeed, the Panel acknowledged as much by conceding that it may have reached a different conclusion from the district court if it had independently examined the record. *See, e.g.*, slip op. 61.

While length restrictions preclude an exhaustive examination of the issues on which the Panel may have come out differently under an independent factual review, one example is the district court's find-

---

[7] In accordance with *Bose* (but in conflict with *Brown & Williamson* and *Novartis*), other circuits undertake independent review of factual findings when determining whether constitutionally protected speech is false or misleading. *See, e.g.*, *Byrum v. Landreth*, 566 F.3d 442, 448 n.5 (5th Cir. 2009); *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1347 (11th Cir. 1998); *Revo v. Disciplinary Bd.*, 106 F.3d 929, 932 (10th Cir. 1997).

ing that the use of "low tar" descriptors is fraudulent because smokers purportedly compensate completely for the lower nicotine yields of those cigarettes through subconscious smoking behavior. Slip op. 44-45. Although that finding should not have survived even the most deferential review, the need for *independent* review is underscored by the fact that a number of courts have reached a conclusion contrary to the one affirmed by the Panel. *E.g.*, *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 627 (D.N.M. 2007) ("a significant number of persons . . . received the promised lower tar and nicotine from Marlboro Lights cigarettes"); *Pearson v. Philip Morris, Inc.*, 2006 WL 663004, at *7 (Or. Cir. Ct. Feb. 23, 2006) (same). Indeed, the record here establishes that "as to ultra low tar cigarettes, . . . a smoker switching down may not be able to compensate fully." *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 438 (D.D.C. 2006).

The Panel also deferred to the district court's finding that descriptors are fraudulent because they are not, as Defendants argued, "simply verbal representations of numerical ratings authorized by the FTC." Slip op. 45. But if the Panel had reexamined that finding de novo, the record would have compelled it to reject the district court's conclusion because it was premised on a flawed comparison between the tar and nicotine yields of cigarettes *of different lengths* (Virginia Slims 100's and Virginia Slims Lights 120's). *See* FTC, *"Tar," Nicotine, and Carbon Monoxide of the Smoke of 1,294 Varieties of Cigarettes* 32 (2000).

* * *